

2010

Wendy Harris v. Shopko Stores, Inc : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WENDY HARRIS,

Plaintiff/Appellant,

v.

SHOPKO STORES, INC.,

Defendant/Appellee.

Case no. 20100106-CA

Dist. Ct. Case no. 070101906

BRIEF OF APPELLANT

Appeal from a Final Judgment of the
Fourth Judicial District Court in and for Utah County,
The Honorable Christine Johnson Presiding

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ERRATA SHEET

damages. (Tr. 851:7-16.) Plaintiff objected to instructing the jury about the issue during the jury instruction conference of July 16, 2009, as Defendant had not meet its court-ordered burden of proof on the issue. (Tr. 851:1-852:2.) Nevertheless, the trial court instructed the jury to reduce future economic damages to present value. (Tr. 947:2-16.)

Apportionment Jury Instruction. During the jury instruction conference of July 16, 2009, Plaintiff objected to instructing the jury regarding apportionment of prior injuries, based on the fact that Defendant had not introduced evidence that any of Plaintiff's injuries to her lower back were caused by a prior condition, and that Defendant had not introduced any evidence that would provide any basis for apportionment. (Tr. 845:11-848:25; 885:7-887:8.) Notwithstanding Plaintiff's objection, the trial court instructed the jury on apportionment of damages for prior conditions. (Tr. 945:7-946:4.)

Testimony on Delayed Recovery. During the trial, Dr. Alan Colledge, an expert witness called by Defendant, testified that Wendy suffered from an unconscious pathology that resulted in her recovery taking longer than would have otherwise been expected. (Tr. 596:24-600:5.) He further testified that this pathology was commonly suffered by people who were victims of accidents caused by someone else, saying "we all have it." (Tr. 598:16-199:8; 639:10-13.) Plaintiff had previously objected to this testimony on the grounds that it was not relevant and that the probative value of such a reference would be substantially outweighed by the danger of unfair prejudice to Plaintiff. (Tr. 559:21-560:15; 562:2-563:10.) The trial court denied Plaintiff's motion. (Tr. 563:19-564:3.)

Dr. Rosenthal's Expert Report. On April 30, 2009, Plaintiff submitted the expert report of Plaintiff's expert witness, Dr. Rosenthal. (R. at 595.) The report was drafted by

(Tr. 566:17-18.) Plaintiff objected on the grounds that the CV constituted inadmissible hearsay. (Tr. 566:22-25.) The trial court overruled Plaintiff's objection and admitted Dr. Colledge's CV into evidence. (Tr. 567:4; R. at 1198 (Exhibit 8).)

SUMMARY OF ARGUMENT

While there are several different issues of law and discretion presented by this appeal, the overarching question is whether a fair trial was had in this matter. The record in this case shows that there was not. To begin with, the trial court disallowed written motions in limine. While this is not error in and of itself, it creates an environment where errors are likely, and in fact several harmful errors occurred.

A careful examination of the record will show that much of Defendant's evidence as to damages was not actual evidence but rather innuendo. Defendant offered no evidence that Wendy had symptomatic preexisting conditions, but implied that she did by listing prior diagnoses listed in Plaintiff's past medical records and reading off symptoms similar to the injuries she suffered from. Likewise, Defendant insinuated that Plaintiff was deserving of less money by offering evidence that she did not heal as fast as one doctor expected, it led the jury to believe that Plaintiff was putting words in the expert's mouth by offering evidence that her counsel had written the expert report, and it improperly bolstered the credibility of its witness using the witness's CV, which constituted inadmissible hearsay evidence. Despite lack of evidence on the issues, the trial court charged the jury regarding reducing future damages to present value and regarding apportionment of damages between the injury at bar and preexisting injuries.

The prejudicial effect of allowing Defendant to present innuendo in place of evidence was compounded when the trial court did not allow Plaintiff to rebut

Defendant's misleading use of Wendy's deposition transcript, refused to admit evidence ~~in~~ that would have rebutted Defendant's counsel's improper testimony as to the height of the chair, and refused to allow Wendy's husband to testify as to the status of their intimate relationship. Because a fair trial was not had in this case, this Court should reverse the trial court's decision and order a new trial.

ARGUMENT

This Court should reverse the trial court's decision and remand for a new trial. In deciding this appeal, this Court should follow a two-step process: first, the Court should determine whether the jury award of \$15,000.00 in past economic damages, \$10,000.00 in future economic damages, and \$1,000.00 in noneconomic damages was within the zone of reasonable awards based on the evidence that the jury heard. Plaintiff's argument regarding this issue is found in Parts I and II of the argument. If the Court determines that the award is outside of the zone of reasonableness, then the Court should reverse the trial court's denial of a new trial.

If the Court finds the award to be reasonable, then the Court should determine whether the court improperly instructed the jury, improperly included or excluded evidence, or otherwise committed errors in law and abuse of discretion.⁵ If the Court determines that errors in law or abuses of discretion occurred, the Court should analyze whether it is reasonably likely that the jury would have given a more favorable award if the jury had heard the proper evidence or instructions. *See Harris v. Utah Transit*

5. Even if the Court finds the jury verdict to be unreasonable, it should still analyze the evidentiary rulings "to avoid the possibility of another appeal raising the same issues." *Robinson v. All-Star Delivery Inc.*, 1999 UT 109, ¶ 21, 992 P.2d 969; *see also* Utah R. App. P. 30(a).

331:19-25.) Wendy went to see a physician and followed his advice. She went to massage therapy based on a doctor's recommendation. (Tr. 345:3-11.) She took pain medicine based upon a prescription. (Tr. 520:9-12.) The massage therapy, chiropractic and pain medicine increased her function and quality of life. (Tr. 217:2-8; 219:12-14; 345:25-346:9; 378:7-16; 400:2-8; 699:2-19.) The uncontested testimony was that if it increases function, treating pain using pain medicine and other "passive treatments" is reasonable. (Tr. 340:2-341:3; 627:9-629:5.) Finally, there was no testimony that these expenses were not medically necessary.

- Dr. Colledge testified that radio frequency treatments have marginal outcomes and would not provide lasting relief since the nerve grows back. (Tr. 621:15-622:3.)

This statement is contradicted by the great weight of the evidence, as Plaintiff testified that the treatment actually worked, (Tr. 709:16-710:16) and Dr. Rosenthal testified that it was likely that after seven years, the nerve would stop growing. (Tr. 249:7-25.) Dr. Colledge did not address this evidence.

- Dr. Rosenthal testified that Wendy regularly finished her thirty-day prescription for pain killers in less than thirty days. (Tr. 253:15-22.)
- Dr. Colledge testified that Wendy's use of pain medication actually lowered her tolerance for pain and so amplified the pain. (Tr. 626:13-627:6.)

These statements are also irrelevant, as the uncontradicted evidence was that her usage of dilaudid was reasonably necessary, (Tr. 245:18-246:14) and that any dependence that Wendy had on pain medicine was a result of her accident at Shopko. (Tr. 254:23-255:14.) Dr. Colledge never stated that Wendy's use of pain medication was unreasonable—just that it should not be taken unless it improves function. (Tr. 586:24-587:13.) The uncontested evidence was that the pain medication improved Wendy's

- Dr. Colledge testified that Wendy had a suspect annular tear and disc bulge. (Tr. 576:23-577:18.) He observed dessication of Wendy's spinal disks consistent with aging. (Tr. 589:21-590:12.) He testified that it was probable that degenerative disc disease was a cause of this annular tear. (Tr. 641:7-14.) Degenerative disc disease is usually caused by aging. (Tr. 578:19-579:6; 588:21-589:12.) Degenerative disc disease can cause facet joint syndrome and can lead to the symptoms Wendy suffered from. (Tr. 298:6-23; 581:2-582:2; 641:7-20.)

There was no evidence that she had symptomatic degenerative disc disease immediately prior to the accident. Dr. Rosenthal stated that her 2009 MRI had no evidence of degenerative disc disease. (Tr. 308:19-309:1.) The report from Dr. Gardner in 2006 was that he did not see annular tear or degenerative collapse, but "some early degenerative changes consistent with her age." (Tr. 545:7-16.) Three different radiologists looked at her reports and did not note degenerative disc disease, even though that is something that ~~is~~ radiologists routinely report. (Tr. 605:9-610:1.)⁷ The diagnosis of annular tear was never confirmed. (Tr. 593:11-24; 611:22-612:3.) Dr. Colledge testified that facet disease can be brought about by a single incident of trauma, (Tr. 583:7-13) and that he believed that her injuries were at least partly due to trauma. (Tr. 584:23-25.) In cross-examination, it became clear that he did not know whether it was the L4-L5 disc or the L5-S1 disc that was degenerating. (Tr. 612:4-617:11.) He testified that it was possible that degenerative disc disease was not a cause of her injuries. (Tr. 618:7-12.) Most importantly, Dr. Colledge testified that it is not uncommon for degenerative disc disease to be asymptomatic, then flare up after a traumatic event. (Tr. 641:25-643:7.)

- When asked, Dr. Colledge said he could not testify to a degree of medical certainty that the accident at Shopko caused Wendy's symptoms. (Tr. 574:25-575:6; 585:8-14.)

7. To be fair, the lack of degenerative disc disease on the radiology reports does not mean that it was not present on the MRI films. (Tr. 640:25-641:6.)

joint dysfunction, (Tr. 535:23-536:12) and can cause radiating pain (Tr. 541:24-542:9) and facet joint syndrome.

There is no indication from the single record where Wendy had arthritis or that she was ever independently diagnosed with arthritis. There was never any evidence put on to show that she was ever diagnosed with degenerative. There was no evidence that she was ever treated or took any medicine for arthritis before the accident at Shopko. There was no evidence that her arthritis had any connection with her injuries. There was no expert opinion as to what extent any preexisting arthritis contributed to her injury, if at all.

- Wendy has had five children. Pregnancy can cause SI joint dysfunction. (Tr. 536:13-18.) Her pregnancies gave her back problems. (Tr. 670:4-15.)

There was no evidence that Wendy had symptomatic SI joint dysfunction immediately before the accident at Shopko. The evidence showed that her back pain went away after she gave birth. (Tr. 670:17-671:5.) There was no expert opinion as to what extent Wendy's pregnancies contributed to her injury, if at all.

- Wendy was previously diagnosed and treated for migraine headaches before the accident. (Tr. 513:16-18.)

Her husband testified that while she had quite a few migraine headaches in the mid to late 1990s, they seemed to go away. (Tr. 671:10-14.) There was no expert opinion as to what extent the migraine headaches contributed to her injury, if at all.

- Wendy was previously diagnosed with depression beginning at age 17; she took Prozac at some time previous to the accident. (Tr. 301:4-15; 362:19-25; 671:15-23.) Dr. Rosenthal sent her to get an assessment for a mood disorder before he treated her. (Tr. 226:15-227:9.)

There is no evidence that Wendy's depression was symptomatic immediately prior to the incident. The latest record that indicates a diagnosis of depression is 2001. (R. at 1197, 82.) Dr. Rosenthal testified that the cause of Wendy's mood disorder was the

P.2d at 1221 (holding that the jury was in error for reducing Plaintiff's award for economic damages without an evidentiary basis). There is simply no combination of figures presented to the jury that could total \$15,000.00 in present damages. Because the parties stipulated to the reasonableness of the amounts, the jury did not have discretion to reject that stipulation and decide that other numbers were more reasonable. The jury verdict is therefore not based on sufficient evidence and this Court should reverse the trial court's decision.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN NOT ORDERING A NEW TRIAL FOR DAMAGES, AS THE JURY'S AWARD OF \$1,000 FOR NONECONOMIC DAMAGES IS INADEQUATE AND APPEARS TO HAVE BEEN GIVEN UNDER PASSION OR PREJUDICE.

Utah appellate courts have stated that a jury award should be set aside for passion and prejudice when the award appears to have no basis in fact and is shocking to the conscience. *See Stamp v. Union Pacific Railroad Co.*, 303 P.2d 279, 282 (Utah 1956). Given the overwhelming evidence of pain and suffering in this case, the jury award of \$1,000.00 cannot be sustained as within the zone of reasonableness.

As a comparison, consider the Utah Supreme Court's decision in *Robinson v. All-Star Delivery Inc.* As in this matter, the plaintiff in *Robinson* was awarded \$1,000.00 in general damages. *See* 1999 UT 109 ¶ 8. However, the similarities end there. In *Robinson*, the plaintiff only suffered \$3,800.00 in economic damages. *See id.* ¶ 4. The plaintiff testified that while he felt pain in his neck, back and leg after the accident, the neck pain resolved after a two weeks, and the leg pain resolved one year later, after he underwent a surgery that was recommended before the accident giving rise to the suit. *See id.* ¶ 7. He further testified that while his back pain still existed three years later, the pain had not

discretion under Utah R. App. P. 24(a)(9). The following is the record evidence in favor of the trial court's decision:

- The witness on the stand when Plaintiff attempted to introduce the evidence was not competent to testify to its foundation. (Tr. 438:3-11.)

The fact that the witness was not competent to lay the foundation does not constitute good cause to excuse the waiver. The very point of the waiver rule is so that the party does not have to call a witness to lay foundation. Holding that lack of evidence of foundation at trial excuses a waiver of an objection to foundation is a vicious circle that would make Rule 26(a)(4) a dead letter. This fact is also irrelevant as to the issues raised by good cause—excusable neglect and possible prejudice.

- The parties stipulated to the admission and foundation of several exhibits before trial. This document was not among those exhibits. (Tr. 439:14-25; 441:12-21.)

The fact that the parties stipulated to certain evidence does not excuse a party from timely filing objections to evidence that was not stipulated to. One of the purposes of requiring disclosure of objections is that the party introducing the evidence knows what objections the other side has and can prepare to meet those objections at trial. Even if parties stipulate to some exhibits, this does not obviate the party opposing non-stipulated evidence to state the nature of its objections beforehand. There may be good cause for excusing the filing of a formal objection if the introducing party actually knows that the other party has a good-faith concern over the admissibility of the evidence. However, this was not the case in this matter. Defendant's Counsel was very familiar with the exhibit in question and has never brought up any question as to the accuracy or authenticity of the specification sheet. (~~Re-~~ at Tr. 431:20-431:11; 435:8-16; 436:23-437:3; 439:22-440:7.)

regarding her quality of life, it was improper bolstering, as Defendant did not attack her credibility on the issue of her intimate relationship, and otherwise it was not relevant. In a recent opinion, this Court explained that testifying as to a person's recollection of events is not improper bolstering, even if that testimony corroborates another person's testimony. *See State v. Pedersen*, 2010 UT App 38, ¶ 21, 227 P.3d 1264. In addition, the fact that one person's testimony of his recollection of events bolsters another person's testimony of his recollection of events ~~is~~ does not make it irrelevant or prejudicial under Utah R. Evid. 403. *See Pedersen*, 2010 UT App 38 ¶¶ 33-35. Mr. Harris's testimony was a substantive recollection of Ms. Harris's quality of life, and so relevant for purposes of noneconomic damages.

X. THE TRIAL COURT IMPROPERLY ALLOWED DR. COLLEDGE'S WRITTEN CURRICULUM VITAE TO BE ADMITTED AS DOCUMENTARY EVIDENCE, AS THE DOCUMENT WAS INADMISSIBLE HEARSAY.

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Utah R. Evid. 801(c). Hearsay is inadmissible unless it falls into a recognized hearsay exception. Utah R. Evid. 802. Dr. Colledge's Curriculum Vitae is a written statement made out of court that was offered to prove what was asserted on the document—namely, Dr. Colledge's credentials. While Dr. Colledge testified as to his credentials separately from the document, this does not excuse the admission of the hearsay evidence. The Utah Court of Appeals has held that using hearsay evidence to "bolster" the statements of a witness is improper. *See State v. Bujan*, 2006 UT App 322, ¶¶ 27-28, 142 P.3d 581.

It is reasonably likely that the having Dr. Colledge's written Curriculum Vitae available for review in the jury room caused the jury to give more weight to Dr.

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JURISDICTIONAL STATEMENT

The Supreme Court has original jurisdiction of this appeal pursuant to Utah Code Ann. § 78A-3-102(3)(j). Pursuant to Rule 42(a) of the Utah Rules of Appellate Procedure, the Supreme Court transferred this appeal to the Utah Court of Appeals, which has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(j).

ISSUES AND STANDARDS OF REVIEW

Issue One. Whether the trial court abused its discretion when it declined to order a new trial on grounds of insufficient evidence to justify the jury's award of \$15,000.00 in present economic damages and \$10,000.00 in future economic damages, even though (1) the jury found Defendant 100% liable for Plaintiff's injury, (2) the undisputed evidence was that Plaintiff's past medical expenses of \$33,203.34 and future medical expenses of \$39,574.00 were both necessary and reasonable, and (3) there is no combination of figures submitted to the jury that would have added up to \$15,000.00 or \$10,000.00. (Issue preserved: R. at 993.)¹

Standard of Review. A trial court's decision to deny a motion for a new trial based on insufficiency of the evidence is reviewed for abuse of discretion. *See Crookston v. Fire Ins. Exchange*, 817 P.2d 789, 805 (Utah 1991).

Issue Two. Whether the trial court abused its discretion when it declined to order a new trial on grounds that the jury's award of \$1,000.00 in non-economic damages was inadequate and appeared to be given under the influence of passion or prejudice, even though (1) the jury found Defendant 100% liable for Plaintiff's injury, (2) the undisputed

1. The record in this case has been Bates-stamped so that the first page of a document has a higher number than the subsequent pages. Therefore, when citing a span of pages, the second number in the span will be lower than the first.

evidence was that Plaintiff suffered considerable pain that significantly interfered with her daily life for over three years, and (3) the undisputed evidence was that Plaintiff's injuries will likely continue to adversely affect her quality of life for some time to come. (Issue preserved: R. at 992.)

Standard of Review. A trial court's decision to deny a motion for a new trial based on the influence of passion or prejudice is reviewed for abuse of discretion. *See Crookston*, 817 P.2d at 805.

Issue Three. Whether the trial court committed prejudicial error when it excluded portions of Plaintiff's deposition transcript from being submitted as evidence where Plaintiff offered the portions of the deposition transcript to clarify other portions of the deposition introduced into evidence by Defendant. (Issue preserved: Tr. 732:24-734:3.)²

Standard of Review. The blanket exclusion of written statements offered for the purpose of clarifying other written statements entered into evidence is a question of law. *See State v. Cruz-Meza*, 2003 UT 32, ¶¶ 8 & 10, 76 P.3d 1165.

Issue Four. Whether the trial court committed prejudicial error when it excluded an exhibit detailing the specifications of the chair that caused Plaintiff's injury from evidence for lack of foundation, even though (1) the foundation for the exhibit was admitted by Defendant under Rule 36 of the Utah Rules of Civil Procedure and never withdrawn, and (2) any objection to foundation was waived by failure to object within the time allotted under Rule 26(a)(4)(C) of the Utah Rules of Civil Procedure and good cause to excuse the waiver was not shown. (Issue preserved: Tr. 444:14-445:1.)

2. To simplify the record citations and make the brief easier to read, references to the trial transcript (R. at 1200-1203) will be abbreviated as Tr., followed by the relevant page and line of the transcript.

Standard of Review. Whether there is adequate foundation for the admission of an exhibit is a question reviewed for abuse of discretion. *See Clayton v. Ford Motor Co.*, 2009 UT App 154, ¶ 6, 214 P.3d 865. A trial court's finding of good cause is reviewed for abuse of discretion. *See State v. Pedockie*, 2004 UT App 224, ¶ 20, 95 P.3d 1182.

Issue Five. Whether the trial court committed prejudicial error when it instructed the jury on reducing future damages to present value, even though (1) the trial court had previously correctly ruled that the burden to produce evidence to allow the jury to calculate the reduction of future damages to present value was on Defendant, and (2) Defendant had produced no evidence that would give the jury a basis to calculate the reduction of future damages to present value. (Issue preserved: Tr. 850:17-856:25.)

Standard of Review. Whether a jury instruction is properly given is a question of law, reviewed for correctness. *See Clayton*, 2009 UT App. 154 ¶ 8; *Kirkpatrick v. Wiley Rein & Fielding*, 2001 UT 107, ¶ 64, 37 P.3d 1130. The allocation of burdens of presenting evidence is a question of law. *See State v. Ferguson*, 2005 UT App 144, ¶ 5, 111 P.3d 820.

Issue Six. Whether the trial court committed prejudicial error when it instructed the jury regarding apportioning damages between the injury at issue and preexisting conditions, even though (1) the uncontested evidence was that Plaintiff was asymptomatic at the time of the injury, and (2) there was no evidence presented regarding apportionment of the damages between Plaintiff's injury on Defendant's premises and any preexisting conditions that she may have had. (Issue preserved: Tr. 845:11-848:25; 885:7-887:8.)

Standard of Review. Whether a jury instruction is properly given is a question of law, reviewed for correctness. *See Clayton*, 2009 UT App. 154 ¶ 8; *Kirkpatrick*, 2001 UT 107 ¶ 64.

Issue Seven. Whether the trial court committed prejudicial error when it allowed an expert witness to testify that Plaintiff had a psychosomatic weakness that delayed her recovery time and increased her pain and suffering beyond that of an average person, even though the testimony could not be used to justify decreasing or barring Plaintiff's recovery for her injury. (Issue preserved: Tr. 559:21-560:15; 562:2-564:3.)

Standard of Review. A judge's determination of relevance is reviewed for abuse of discretion. *See Slisze v. Stanley-Bostitch*, 1999 UT 20, ¶ 17, 979 P.2d 317. A judge's decision to admit or exclude evidence based on Rule 403 of the Utah Rules of Evidence is reviewed for abuse of discretion. *See State v. Hamilton*, 827 P.2d 232, 239 (Utah 1992).

Issue Eight. Whether the trial court committed prejudicial error when it allowed counsel for the Defendant to elicit testimony that Dr. Rosenthal's expert report was drafted by counsel for the Plaintiff, even though it is a practice specifically endorsed by the Utah Rules of Civil Procedure and the testimony was highly prejudicial to Plaintiff. (Issue preserved: Tr. 24:15-31:1.)

Standard of Review. A judge's determination of relevance is reviewed for abuse of discretion. *See Slisze*, 1999 UT 20 ¶ 17. A judge's decision to admit or exclude evidence based on Rule 403 of the Utah Rules of Evidence is reviewed for abuse of discretion. *See Hamilton*, 827 P.2d at 239 (Utah 1992).

Issue Nine. Whether the trial court committed prejudicial error when it excluded the testimony of Tom Harris, Plaintiff's husband, relating to his intimate relationship with Plaintiff, when it was offered for the purpose of illustrating Plaintiff's diminished capacity for the enjoyment of life. (Issue preserved: Tr. 679:11-680:8.)

Standard of Review. A judge's determination of relevance is reviewed for abuse of discretion. *See Slisze*, 1999 UT 20 ¶ 17.

Issue Ten. Whether the trial court committed prejudicial error when it allowed Dr. Colledge's written Curriculum Vitae to be admitted as documentary evidence over Plaintiff's objection that the document constituted inadmissible hearsay. (Issue preserved: Tr. 566:22-25.)

Standard of Review. Whether evidence constitutes hearsay is a question of law, reviewed for correctness. *See Prosper, Inc. v. Dept. of Workforce Services*, 2007 UT App 281, ¶ 8, 168 P.3d 344.

Issue Eleven. Whether the cumulative weight of the trial court's errors justifies a new trial in this matter. (Issue preserved: R. at 994.)

Standard of Review. The cumulative error doctrine requires the reviewing court to apply the standard of review applicable to each underlying claim of error. *See Radman v. Flanders Corp.*, 2007 UT App 351, ¶ 4, 172 P.3d 668.

RELEVANT STATUTORY PROVISIONS

There are no statutory provisions whose interpretation is central to this appeal.

STATEMENT OF THE CASE

Plaintiff Wendy Harris brought suit against Defendant ShopKo Stores, Inc. for personal injury on May 7, 2007. (R. at 6.) Plaintiff brought claims for the injuries she

sustained when she sat in a chair that fell apart, causing her to fall to the floor. (R. at 6.)

A jury trial in this matter was held on July 13-16, 2009, before Judge Christine S.

Johnson. (R. at 1200-03.) At the conclusion of the trial, the jury found Defendant 100% at fault for Plaintiff's injuries. (Tr. 1016:13-1017:1.) The jury awarded Plaintiff economic damages in the amount of \$25,000.00, comprising past medical expenses of \$15,000.00 and future medical expenses of \$10,000.00, and non-economic damages in the amount of \$1,000.00. (Tr. 1017:1-4.)

Plaintiff brought a motion for new trial on August 25, 2009, arguing abuse of discretion, error in law, inadequate damages appearing to have been given under the influence of passion and prejudice, and insufficiency of the evidence to justify the verdict. (R. at 922.) This motion was denied in a memorandum decision by Judge Johnson on December 23, 2009. (R. at 1139.) Final judgment was entered on January 13, 2010. (R. at 1154.) Plaintiff filed a notice of appeal on February 3, 2010. (R. at 1188.)

STATEMENT OF THE FACTS

I. BACKGROUND OF THE LITIGATION

Wendy Harris's Accident at Shopko. On March 29, 2006, Appellant Wendy Harris went into Shopko's Provo store to buy an office chair. (Tr. 692:6-11.) There were various chairs on display at the store in an area where customers could test the chairs, and where the floor was hard and flat. (Tr. 427:8-16; 451:23-25.) Wendy sat in some of the chairs to try them out. (Tr. 692:13-16.) As she sat in one of the chairs, the chair suddenly split apart; the seat of the chair went flying in one direction and the wheels and base went flying in the opposite direction. (Tr. 692:17-693:2.) Wendy fell straight down and landed on her wrist and the left side of her tailbone. (Tr. 693:11-25.)

She started to get up on her own, and was helped by a Shopko employee. (Tr. 694:19-23.) She tried to fill out Shopko's accident report, but she could not do it. In Wendy's own words, "I was shaking. I mean, really shaking. And a young girl behind the counter actually filled it out for me." (Tr. 695:7-13.) While she was able to leave the store on her own, she was still shaking and she felt "a ringing sensation" in her whole body. (Tr. 695:15-23.)

Medical Care. The next day, Wendy started to feel deep abdominal pain that she described as similar to the pain she had after she underwent a hysterectomy. She was worried that "something had come loose" from that surgery, and so she went to the hospital. (Tr. 696:13-697:8.)

Over the next few days, Wendy's wrist pain resolved, but the pain localized into her lower back and tailbone area. (Tr. 697:15-23.) She went to see her brother, Kay Whittaker, a family nurse practitioner, and ultimately saw several other doctors and therapists. (698:3-699:19.) The physicians treating her observed that she was suffering from severe and intense pain in her lower back and tailbone. (Tr. 217:2-8; 344:6-10; 371:13-373:6; 397:25-398:11; 519:15-520:1; 522:6-15; 573:23-574:17.) The pain radiated down the back of her leg to her knee. (Tr. 217:2-8; 397:25-398:11; 540:11-541:11.) Even after almost three years, the pain did not resolve. (Tr. 217:19-21.) Despite incurring over \$25,000.00 in medical expenses as of the end of 2008, her treating physicians and therapists could not offer her more than temporary relief through pain medicine, massage therapy and chiropractic care. (Tr. 378:7-16; 383:10-20; 400:2-8; 543:3-544:15; 590:13-20; 624:9-20; 675:4-14; 699:2-19; 722:16-723:15; R. at 1197, 229-237.)

Wendy's Quality of Life after the Accident. Wendy's pain began to significantly interfere with her daily life. Before the accident, Wendy was active and energetic, very outgoing and socially involved. (Tr. 647:13-24; 648:13-22; 650:15-20; 667:15-21.) She was not suffering from any chronic low-back pain before the accident. (Tr. 240:23-241:1; 515:17-516:2; 572:7-14; 650:21-24; 670:17-671:5.) She would play tennis with her husband and participate in other activities with her family. (Tr. 708:3-709:3.) She would often get together with her friends to go shopping and to watch movies together. (Tr. 648:14-22.) She enjoyed being involved in the PTA, the school activities of her five children, and other community projects. (Tr. 648:2-649:10; 669:11-22; 702:21-703:7.) She helped her husband with the paperwork for his business. (Tr. 666:12-23.) She also felt a deep satisfaction from taking care of her family, and had a vigorous everyday schedule of cooking and cleaning her house. (Tr. 670:4-15; 699:20-700:7.)

After the accident, she attempted to continue with her schedule as normal. In her words, "I just thought it was just like anything else; I just had to kind of get through it. And I just knew it would go away. It would go away. I just kept telling myself, 'Tomorrow it will be fine.' You just push yourself and your kids. There's so much to do." (Tr. 699:20-700:7.) However, the pain did not go away, and she had to stop doing the things she enjoyed doing. (Tr. 683:5-16; 700:8-23.) The pain affected her sleep. (Tr. 217:22-24.) Her intimate relationship with her husband suffered. (Tr. 709:4-10; 712:19-21.) She could not sit for long periods of time. (Tr. 651:19-652:11; 725:14-17.) If she forced herself to sit, it would aggravate her pain for the next few days. (Tr. 685:13-22.) Most days, she was unable to perform everyday tasks like cooking for her family and cleaning her house. (Tr. 674:2-675:3.) Her husband devoted less time to work so that he

could help with the household and help care for her and drive her to doctor's appointments. (Tr. 674:13-675:14; 700:13-23.) Their adult daughter moved back into the house to help care for Wendy's youngest son, Bridger. (Tr. 708:17-709:3.) Her family's activities became limited based on how she could function. (Tr. 677:22-678:4.) She could no longer do the things with friends that she once did. (Tr. 654:2-13.) She withdrew from her previous active place in the community. (Tr. 656:13-657:1.)

Wendy's pain and resulting loss of function affected her emotionally. She was frustrated and angry that she could not function normally and that she could not get the help she needed to ease her pain. (Tr. 676:8-677:8; 700:25-701:19.) The pain began to consume her and her family's daily life. (Tr. 677:22-679:8.)

Of the things she could no longer do, the thing that was hardest on Wendy was that she was limited in caring for Bridger. Bridger was three years old at the time of the accident. (Tr. 701:20-23.) After the accident, she could no longer pick him up and hold him, and could not run and play with him like she used to. (Tr. 701:24-702:16.) She has not been involved with his schooling and activities to the degree that she was with her older children. (Tr. 702:21-703:7.) In her testimony, Wendy described a day when she had to walk Bridger to preschool because there was no car in which to take him:

[B]y the time I had gotten—it was about three blocks, long blocks, and then you enter this pathway that's really long and it opens up to the back field of the school, and you've got a ways to go to get to the school. And by the time I got into that gateway area, . . . if you walk, it starts—your back starts having spasms all the way up, just severe spasms, and the quicker you go, the worse they become . . . I said, "Bridger, you know, Mommy can't go all that way." He knew it. He goes, "Okay. Mommy, that's okay. I can do it." . . . I remember just being sick watching him. And I thought—I just felt like I was a bad mom . . . I cried all the way home, and I remember keeping my head down. I was scared a neighbor would see me or someone would stop to give me a ride. I just thought, "I just need to get home. No one needs to see me," and I just got

home and I didn't go upstairs. I laid down on the living room floor, and I just realized I'm never going to be enough for him unless this goes away.

(Tr. 703:8-705:10.)

Recent and Future Treatment. Despite her depression, Wendy kept stretching and exercising so that she could improve her function and did her best to take care of her family. (Tr. 698:16-699:19; 705:15-707:8.) In 2009, a little less than three years after the accident, Wendy was referred to Dr. Rosenthal, a board-certified pain management specialist. (Tr. 217:13-21.) He diagnosed her with facet joint syndrome, an inflammation of one of the spinal joints, (Tr. 224:5-225:25) and coccydinia, inflammation of the tailbone. (Tr. 231:20-232:3.) He treated her facet joint syndrome with a radio frequency lesioning treatment, which severs the nerve to the facet joint and stops the pain. (Tr. 229:3-25; 231:7-17.) Wendy testified that the treatment decreased her pain and increased her function and quality of life. (Tr. 709:16-710:16.) Because the nerve will eventually repair itself, this process will need to be repeated every 9-14 months for about seven years until the nerve stops growing back. (Tr. 249:1-16.)

Coccydinia is difficult to treat, since putting any pressure on the tailbone prevents healing. (Tr. 232:4-12.) However, sitting on a donut cushion, along with occasional injection of steroids and anesthetics to reduce the inflammation of the ligaments of the tailbone, will likely eventually allow the tailbone to heal. (Tr. 233:6-19.) In the meantime, Dr. Rosenthal recommended continuing pain medicine to manage any remaining pain. (Tr. 250:7-251:2.)

While Dr. Rosenthal believes that Wendy's pain will ultimately resolve, (Tr. 256:13-25) he noted that she will have permanent loss of mobility in her lower spine, (Tr.

257:8-258:1) and that it is possible that she will develop sciatica from her injuries related to the accident at Shopko. (Tr. 258:2-17.) Despite that, the reduction in pain has allowed Wendy to do more of the things that she did before the accident. (Tr. 657:2-658:2; 680:14-23; 709:16-710:16.)

II. PROCEDURAL HISTORY

Pretrial. Plaintiff brought suit against ShopKo on May 7, 2007. (R. at 6.) Plaintiff's original counsel in this matter was William Rawlings. (R. at 6.) Mr. Rawlings withdrew as counsel on June 19, 2008, (R. at 121) and had refused to give Plaintiff her litigation file. (R. at 448; 451; 930.) Plaintiff proceeded *pro se* until January 27, 2009, when she retained the services of Day Shell & Liljenquist, L.C., who convinced Mr. Rawlings to surrender Plaintiff's file on January 29, 2009. (R. at 930.)

At the pretrial conference of February 23, 2009, Defendant objected to submitting further motions in limine before trial, stating that there had already been motions in limine while Plaintiff was acting *pro se*, and that submitting further motions in limine would be unfair to Defendant. (R. at 930.) The Court agreed to disallow written motions in limine, but stated that it would hear oral motions in limine on the first morning of trial. (R. at 612.)³

Testimony as to Damages. Dr. Rosenthal appeared as an expert witness at the trial. He testified to a reasonable degree of medical certainty that it was more likely than not that Wendy's pain and injuries were caused by the accident at Shopko, (Tr. 235:25-236:23; 244:24-245:9) that the \$33,203.34 in medical expenses she had incurred since the

3. At the time of the pretrial conference, Judge Mortensen was presiding in this matter.

accident were medically necessary, (Tr. 245:18-246:14) and that she had sustained permanent injuries that would require future medical care in the amount of \$39,574.00. (Tr. 246:17-247:3.) The parties had earlier stipulated that the amounts of the prior treatments were reasonable, (R. at 863; 865-64) and Dr. Rosenthal testified that the amounts of the future treatments were reasonable. (Tr. 247:6-9.) While the jury heard evidence that Wendy had some prior medical conditions, there was no evidence that any of these conditions were symptomatic prior to the injury, and there was no expert testimony as to what portion of Wendy's injuries were caused by preexisting conditions.⁴

Deposition Transcript. During Defendant's cross-examination of Wendy Harris, counsel for Defendant read into the record the following portion of a response given by Wendy Harris in her deposition transcript in an attempt to impeach Plaintiff's credibility:

"Question: So you are up at 6:30 or 7:00, and if you're feeling okay you take your son to preschool. Well, what do you do when he's in preschool?" Your answer, "I work, do household—you know, everything, vacuum, cleaning, everything to do with—I take care of the home."

(Tr. 728:20-729:1.) In fact, Defendant had stopped reading the answer halfway through the response. The complete answer is as follows:

A. I work, do household—you know, everything, vacuum, cleaning. Everything to do with—I take care of the home. *And the days that I'm worse, I don't. Like I don't do anything. So it just takes longer to do what I used to do, so—I don't ever finish all the things I should be doing.*

(R. at 977.) When Plaintiff attempted to read the remainder of the deposition into evidence, Defendant objected on grounds that it was an improper use of a deposition, and the trial court sustained the objection. (Tr. 733:10-25.)

4. These points are discussed in detail with appropriate citations to the record in Point I.B of the Argument, *infra* at 24-30.

Chair Specification Sheet. The chair that fell apart, causing Wendy's accident at ShopKo was manufactured by Office Star Products. Office Star was named as a Defendant to the lawsuit, but was dismissed before trial. (R. at 37; 105.) As part of its initial disclosures, Office Star Products produced a specification sheet for the model of chair in which Plaintiff sat when her injuries were sustained. (R. at 929.)

On April 6, 2009, Plaintiff served Defendant with a request for admission to Defendant, requesting that it "[a]dmit that the Chair at issue in this case is Office Star Model #2993 and that photographs and instructions attached hereto as Exhibit B are accurate photographs and instructions for the Chair at issue in this case." (R. at 967.) Exhibit B included the specification sheet previously disclosed by Office Star. (R. at 963.) Defendant admitted to the request. (R. at 958.) On March 9, 2009, Plaintiff also disclosed the specification sheet to Defendant as a trial exhibit, to which Defendant made no objection. (R. at 956-953.)

At the trial, Plaintiff attempted to introduce the specification sheet into evidence during the examination of Defendant's employee, Sean Briggs. (Tr. 431:6-19.) Defendant objected for lack of foundation. (Tr. 433:13-14.) While Plaintiff pointed out that the foundation was established by Defendant's admission and waived for failure to object, (Tr. 432:1-12, 434:18-22, 435:8-16) the trial court sustained Defendant's objection. (Tr. 444:23-445:1.)

Present Value Jury Instruction. On January 21, 2009, the trial court issued a minute entry placing the burden on Defendant to prove the reduction of future damages to present value. (R. at 381-380.) Defendant offered no proof and presented no evidence at trial that would provide the jury with a basis for calculating the present value of future

damages. (Tr. 851:7-16.) Plaintiff objected to instructing the jury about the issue during the jury instruction conference of July 16, 2009, as Defendant had not meet its court-ordered burden of proof on the issue. (Tr. 851:1-852:2.) Nevertheless, the trial court instructed the jury to reduce future economic damages to present value. (Tr. 947:2-16.)

Apportionment Jury Instruction. During the jury instruction conference of July 16, 2009, Plaintiff objected to instructing the jury regarding apportionment of prior injuries, based on the fact that Defendant had not introduced evidence that any of Plaintiff's injuries to her lower back were caused by a prior condition, and that Defendant had not introduced any evidence that would provide any basis for apportionment. (Tr. 845:11-848:25; 885:7-887:8.) Notwithstanding Plaintiff's objection, the trial court instructed the jury on apportionment of damages for prior conditions. (Tr. 945:7-946:4.)

Testimony on Delayed Recovery. During the trial, Dr. Alan Colledge, an expert witness called by Defendant, testified that Wendy suffered from an unconscious pathology that resulted in her recovery taking longer than would have otherwise been expected. (Tr. 596:24-600:5.) He further testified that this pathology was commonly suffered by people who were victims of accidents caused by someone else, saying "we all have it." (Tr. 598:16-199:8; 639:10-13.) Plaintiff had previously objected to this testimony on the grounds that it was not relevant and that the probative value of such a reference would be substantially outweighed by the danger of unfair prejudice to Plaintiff. (Tr. 559:21-560:15; 562:2-563:10.) The trial court denied Plaintiff's motion. (Tr. 563:19-564:3.)

Dr. Rosenthal's Expert Report. On April 30, 2009, Plaintiff submitted the expert report of Plaintiff's expert witness, Dr. Rosenthal. (R. at 595.) The report was drafted by

Plaintiff's counsel after consulting with Dr. Rosenthal. (Tr. 24:15-17.) Dr. Rosenthal personally reviewed and signed the report before it was submitted. (Tr. 316:11-20.)

Before trial, Plaintiff made an oral motion in limine requesting that the trial court prohibit any mention of the fact that Plaintiff's attorney had drafted the expert report of Dr.

Rosenthal, on the grounds that any probative value would be substantially outweighed by the danger of unfair prejudice to Plaintiff and confusion to the jury. (Tr. 24:15-26:6.) The trial court denied Plaintiff's motion, (Tr. 30:8-31:1) and upon the commencement of the cross-examination of Dr. Rosenthal by Defendant, the trial court stated the following to the jury:

Before we commence with the cross-examination, I'll just advise the jury that as you've heard from the testimony yesterday Dr. Rosenthal's testimony in large part deals with a report that he submitted. The report was the subject of his direct examination yesterday. You [are] advised that pursuant to Rule 26 a witness who is retained or specially employed to provide expert testimony in a case is required to submit a written report. That report may be prepared and signed by either the witness who's testifying or by the party.

(Tr. 288:20-289:5.) Thereafter, the trial court permitted Defendant to mention the fact that Plaintiff's attorney had drafted the report.

Testimony of Tom Harris. During the examination of Tom Harris on July 15, 2009, Plaintiff attempted to question Mr. Harris regarding his intimate relationship with his wife, Wendy Harris, for the purpose of illustrating the change in Plaintiff's quality of life as a result of her injuries. (Tr. 679:11-680:7.) Defendant objected on the grounds that the testimony was not relevant and that no claim for loss of consortium had been made. (Tr. 679:17-19.) The trial court sustained Defendant's objection. (Tr. 680:8.)

Dr. Colledge's Curriculum Vitae. During Defendant's examination of Dr. Colledge, Defendant offered Dr. Colledge's written curriculum vitae (CV) into evidence.

(Tr.) Plaintiff objected on the grounds that the CV constituted inadmissible hearsay. (Tr. 566:22-25.) The trial court overruled Plaintiff's objection and admitted Dr. Colledge's CV into evidence. (Tr. 567:4.)

SUMMARY OF ARGUMENT

While there are several different issues of law and discretion presented by this appeal, the overarching question is whether a fair trial was had in this matter. The record in this case shows that there was not. To begin with, the trial court disallowed written motions in limine. While this is not error in and of itself, it creates an environment where errors are likely, and in fact several harmful errors occurred.

A careful examination of the record will show that much of Defendant's evidence as to damages was not actual evidence but rather innuendo. Defendant offered no evidence that Wendy had symptomatic preexisting conditions, but implied that she did by listing prior diagnoses listed in Plaintiff's past medical records and reading off symptoms similar to the injuries she suffered from. Likewise, Defendant insinuated that Plaintiff was deserving of less money by offering evidence that she did not heal as fast as one doctor expected, it led the jury to believe that Plaintiff was putting words in the expert's mouth by offering evidence that her counsel had written the expert report, and it improperly bolstered the credibility of its witness using the witness's CV, which constituted inadmissible hearsay evidence. Despite lack of evidence on the issues, the trial court charged the jury regarding reducing future damages to present value and regarding apportionment of damages between the injury at bar and preexisting injuries.

The prejudicial effect of allowing Defendant to present innuendo in place of evidence was compounded when the trial court did not allow Plaintiff to rebut

Defendant's misleading use of Wendy's deposition transcript, refused to admit evidence in that would have rebutted Defendant's counsel's improper testimony as to the height of the chair, and refused to allow Wendy's husband to testify as to the status of their intimate relationship. Because a fair trial was not had in this case, this Court should reverse the trial court's decision and order a new trial.

ARGUMENT

This Court should reverse the trial court's decision and remand for a new trial. In deciding this appeal, this Court should follow a two-step process: first, the Court should determine whether the jury award of \$15,000.00 in past economic damages, \$10,000.00 in future economic damages, and \$1,000.00 in noneconomic damages was within the zone of reasonable awards based on the evidence that the jury heard. Plaintiff's argument regarding this issue is found in Parts I and II of the argument. If the Court determines that the award is outside of the zone of reasonableness, then the Court should reverse the trial court's denial of a new trial.

If the Court finds the award to be reasonable, then the Court should determine whether the court improperly instructed the jury, improperly included or excluded evidence, or otherwise committed errors in law and abuse of discretion.⁵ If the Court determines that errors in law or abuses of discretion occurred, the Court should analyze whether it is reasonably likely that the jury would have given a more favorable award if the jury had heard the proper evidence or instructions. *See Harris v. Utah Transit*

5. Even if the Court finds the jury verdict to be unreasonable, it should still analyze the evidentiary rulings "to avoid the possibility of another appeal raising the same issues." *Robinson v. All-Star Delivery Inc.*, 1999 UT 109, ¶ 21, 992 P.2d 969; *see also* Utah R. App. P. 30(a).

Authority, 671 P.2d 217, 222 (Utah 1983). In making this determination, the Court should consider the extent to which the error was significant in the case as a whole, e.g., whether the evidence was unique or cumulative, the importance of the evidence to the case, etc. *See Hamilton*, 827 P.2d at 240. As a general principle, the lower the award is with respect to the zone of reasonableness, the more likely that additional favorable evidence would translate into a higher award for damages, and thus, it is more likely that any given error would be harmful. If, by the end of considering the effect of the error, the Court determines that the “likelihood of a different outcome [is] sufficiently high to undermine confidence in the verdict,” the Court must order a new trial. *Id.* Plaintiff’s analysis of these issues is found in Parts III through XI of the Argument.

I. THE TRIAL COURT ABUSED ITS DISCRETION IN NOT ORDERING A NEW TRIAL FOR DAMAGES, AS THERE WAS INSUFFICIENT EVIDENCE TO JUSTIFY THE JURY’S DECISION THAT PLAINTIFF WAS ONLY ENTITLED TO \$25,000.00 IN ECONOMIC DAMAGES.

Because the law and the facts in this matter do not support the jury’s award for economic damages, the trial court abused its discretion in denying Plaintiff’s motion for a new trial under Utah R. Civ. P. 59(a)(6). Once liability has been established in a suit for personal injury, a plaintiff is entitled to recover his or her medical expenses upon showing that those expenses were for “necessary treatment that resulted from the injuries and that the charges are reasonable.” *Gorostieta v. Parkinson*, 2000 UT 99, ¶ 35, 17 P.3d 1110. In this matter, the jury found Defendant 100% liable for Wendy Harris’s damages. The jury heard evidence that Wendy Harris’s past medical expenses were \$33,203.34, and her future medical expenses were \$39,574.00. There was expert testimony that both of these amounts were necessary and reasonable. To award less than this, there had to be

competent evidence that these expenses were either not reasonable and necessary, or that some of the medical expenses were incurred as a result of conditions not caused by the Defendant. Neither of these propositions can be supported by the evidence.

A. There was insufficient record evidence for a jury to find that the past and future medical expenses submitted to the jury were not reasonable and necessary.

Applicable Law. Utah law provides for the recovery of medical expenses if they were reasonably necessary. *See Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 981 (Utah 1993); Restatement (Second) of Torts § 924 (1979). Whether an expense is reasonably necessary is not determined retrospectively by whether the treatment was actually successful, but rather whether a reasonably prudent person in a similar situation would have undertaken a similar act. *See* Restatement (Second) of Torts § 919 cmts. b & c. Further, the amount of future damages “may be based upon approximations, if . . . the approximations are based upon reasonable assumptions or projections.” *Atkin Wright & Miles v. Mountain States Tel. & Tel. Co.*, 709 P.2d 330, 336 (Utah 1985). Once Plaintiff has established an approximation of future damages, it is up to the Defendant to provide affirmative evidence that an alternate figure is more likely. *See Ault v. Dubois*, 739 P.2d 1117, 1120-21 (Utah App. 1987).

Trial Evidence. Pursuant to Utah R. App. P. 24(a)(9), Plaintiff hereby marshals the following record evidence that could be construed in favor of the jury’s decision with respect to whether Plaintiff’s past and future medical expenses were reasonable and necessary:

- Dr. Rosenthal testified that he was not positive as to Wendy’s future treatment—he referred to it as “looking into a crystal ball.” (Tr. 250:16-251:2.) He further

testified that his projection for future pain medication followed a “worst-case scenario.” (Tr. 324:4-325:14.)

This statement is irrelevant. As stated earlier, it is not Plaintiff’s burden to provide absolute certainty with respect to the amount of future damages. Dr. Rosenthal testified to a degree of medical certainty that it was more probable than not that her future medical needs were as he stated. (Tr. 246:17-247:3; 326:5-15.) Further, his comment about following a “worst-case scenario” was only in the context of her only getting partial pain relief, not the amount of medicine she would need. (Tr. 324:4-325:14.) He testified that she may need more pain medicine than his projections, but the scenario he presented to the jury was his “best assessment.” (Tr. 325:25-326:13.) As explained previously, Defendant cannot refute this testimony without providing evidence that an alternative amount of damages is more likely.

- Dr. Rosenthal testified that if a diagnosis had been rendered earlier, that it was “probable” that the intervening care would not have been necessary. (Tr. 314:8-315:25.)
- There was testimony that the pain medicine, massage therapy, and chiropractic care treated Wendy’s symptoms, but would not offer any long-term relief. (Tr. 323:25-324:3; 378:7-16; 383:10-20; 400:2-8; 543:3-544:15; 593:25-594:19.)

These two statements are also irrelevant from a legal standpoint. As stated earlier, whether a medical treatment was reasonably necessary is not determined by looking at an ideal outcome, but rather what a reasonable person would do given the same information and circumstances. Dr. Rosenthal testified that sometimes low-back conditions resolve with chiropractic or physical therapy. (Tr. 331:2-25.) He further testified that, given the fact that the facet joint syndrome and coccydinia had not yet been discovered, he had no issues with the prior treatment and thought it was appropriate. (Tr. 311:1-7; 312:14-20;

331:19-25.) Wendy went to see a physician and followed his advice. She went to massage therapy based on a doctor's recommendation. (Tr. 345:3-11.) She took pain medicine based upon a prescription. (Tr. 520:9-12.) The massage therapy, chiropractic and pain medicine increased her function and quality of life. (Tr. 217:2-8; 219:12-14; 345:25-346:9; 378:7-16; 400:2-8; 699:2-19.) The uncontested testimony was that if it increases function, treating pain using pain medicine and other "passive treatments" is reasonable. (Tr. 340:2-341:3; 627:9-629:5.) Finally, there was no testimony that these expenses were not medically necessary.

- Dr. Colledge testified that radio frequency treatments have marginal outcomes and would not provide lasting relief since the nerve grows back. (Tr. 621:15-622:3.)

This statement is contradicted by the great weight of the evidence, as Plaintiff testified that the treatment actually worked, (Tr. 709:16-710:16) and Dr. Rosenthal testified that it was likely that after seven years, the nerve would stop growing. (Tr. 249:7-25.) Dr. Colledge did not address this evidence.

- Dr. Rosenthal testified that Wendy regularly finished her thirty-day prescription for pain killers in less than thirty days. (Tr. 253:15-22.)
- Dr. Colledge testified that Wendy's use of pain medication actually lowered her tolerance for pain and so amplified the pain. (626:13-627:6.)

These statements are also irrelevant, as the uncontradicted evidence was that her usage of dilaudid was reasonably necessary, (Tr. 245:18-246:14) and that any dependence that Wendy had on pain medicine was a result of her accident at Shopko. (Tr. 254:23-255:14.) Dr. Colledge never stated that Wendy's use of pain medication was unreasonable—just that it should not be taken unless it improves function. (Tr. 586:24-587:13.) The uncontested evidence was that the pain medication improved Wendy's

function. (Tr. 345:25-346:9.) Dr. Hogenson testified that Wendy was not addicted to pain medicine, (Tr. 348:6-13) and there was no evidence that she was abusing or overusing the pain medicine. There was no evidence that Wendy was suffering from hyperalgesia—Dr. Colledge’s statements were not based on an examination or anything other than speculation. Dr. Hogenson testified that Wendy’s dose of pain medication stayed stable while he was treating her, (Tr. 347:16-348:5) leading one to believe that her tolerance had not increased to the point of hyperalgesia.

- One of Plaintiff’s massage treatments was listed as a couples massage. (Tr. 407:22-408:5.)

This statement is not supported by any evidence that Wendy’s treatment that day was not medically necessary. Also, the record suggests that the massage for Mr. Harris was free, since the cost of the massage was \$39.00, the same as Wendy’s previous treatments. (R. at 1197, 206 & 231 (Records of 8/1/2008).) Even if the jury determined that one-half of the cost was attributable to Mr. Harris, that conclusion would still only justify a deduction of \$19.50.

- Wendy stopped going to physical therapy after four visits. (Tr. 724:4-23.)

Wendy testified that the physical therapy consisted of exercises that she could learn and do at home. (Tr. 705:15-706:7.) The uncontradicted evidence was that she did this. (Tr. 592:3-9; 706:8-707:8.) There was no evidence presented that Wendy doing these exercises at home increased her damages or by how much.

- Dr. Colledge testified that Wendy had gained 16 pounds and needed to lose it. (Tr. 592:14-593:10.)

There was no testimony as to how the extra weight affected Wendy’s treatment or damages. The uncontradicted evidence was that she was maintaining a low-calorie diet

and keeping as active as her condition would allow. (Tr. 592:3-9; 596:6-11; 706:8-707:8.)

Wendy did not need to engage in unreasonable efforts in order to lose weight. *See*

Restatement (Second) of Torts § 919 cmt. b.

- Dr. Colledge testified that any soft tissue injury should have healed within a month. (Tr. 586:10-19.)

This is irrelevant, as the uncontradicted evidence was that her pain was real. (Tr. 601:6-602:13.) A tortfeasor takes its victim as it finds her, and cannot seek to reduce damages by offering testimony that the victim was unusually fragile. *See Ryan v. Gold Cross Svc., Inc.*, 903 P.2d 423, 428 (Utah 1995).

- Dr. Colledge testified that “the quality of life of the person is far greater determined by how we take responsibility and do what we can on our own rather than expect somebody in a white coat that’s got a magic pill, or a magic shot or a magic burning of the nerve or something that’s going to make us all of a sudden better.” (Tr. 595: 1-7.)

There was no testimony that Wendy was not taking responsibility for her quality of life. The uncontradicted evidence was that Wendy was still attempting to go on with her life. (Tr. 698:16-699:19; 705:15-707:8; 727:7-730:16.) Any difficulty that she had in recovering, so long as she was not consciously malingering, is not a basis for a reduction in damages. *See Bourne v. Washburn*, 441 F.2d 1022, 1026 (D.C. Cir. 1971).

In this case, there was no relevant affirmative evidence that the treatments were not reasonably necessary. The jury’s award of less than the full amount of \$33,203.34 in past medical expenses and \$39,574.00 in future medical expenses is therefore not supported by the evidence. Because the uncontested evidence was that Wendy’s economic damages were in these amounts, this court should order the trial court to increase the award of economic damages to \$72,777.34. *See Judd v. Rowley’s Cherry*

Hill Orchards, Inc., 611 P.2d 1216, 1221 (Utah 1980). In the alternative, this Court should order a new trial on the issue of economic damages.

B. There was insufficient record evidence for a jury to find that there were symptomatic prior existing conditions that could be apportioned as a distinct cause of Plaintiff's injuries.

Applicable Law. Because a defendant is only responsible for the injuries caused by its acts or omissions, preexisting conditions can sometimes reduce a plaintiff's amount of recovery. However, that preexisting condition must be symptomatic immediately prior to the injury. A preexisting condition that is dormant or asymptomatic before the injury and is "lit up" by the injury is proximately caused by the injury. *See Biswell v. Duncan*, 742 P.2d 80, 88 (Utah App. 1987). Also, for a party to reduce damages based on a preexisting condition, the party must show "a reasonable basis for determining the contribution of each cause to a single harm." *Robinson*, 1999 UT 109, ¶ 12. If no basis can be given, "the courts have refused to make an arbitrary apportionment for its own sake, and each of the causes is charged with responsibility for the entire harm." *Id.* Evidence that a preexisting condition was likely a contributing factor to a plaintiff's injury is not sufficient evidence to provide a basis for apportioning damages. *See Garcia v. Wal-Mart Stores*, 209 F.3d 1170, 1175 (10th Cir. 2000) (applying Colorado law).⁶ Also, evidence that a plaintiff's injury was expected to heal within six months is not sufficient evidence to provide a basis for apportioning damages. *See id.*

Trial Evidence. At trial, there was no evidence presented that Wendy was suffering from any symptomatic preexisting conditions immediately prior to the accident

6. Utah based its rules on apportionment on Colorado law. *See Robinson*, 1999 UT 109 ¶ 32 (Russon, J., dissenting).

at Shopko. In fact, the uncontested evidence was that Wendy was not suffering from lower-back problems immediately prior to the accident, (Tr. 240:23-241:1; 389:10-392:4; 572:7-14; 650:21-24; 670:17-671:5) and that she had never been treated for chronic back problems or chronic pain at any time. (Tr. 349:20-350:1; 365:5-8; 515:17-516:2; 670:17-671:5.) There was also no expert testimony as to what percentage of Wendy's treatment was due to prior symptomatic conditions, no testimony as to which ailments necessitated which treatments, nor any other testimony that would create a basis for apportionment of damages.

Pursuant to Utah R. App. P. 24(a)(9), the following is the record evidence that could be construed in favor of the trial court's decision with respect to reducing damages based on conditions not caused by Defendant's acts or omissions:

- Wendy's medical records showed that Wendy had a prior episode of low back pain. (Tr. 239:2-240:22.)

The uncontested evidence was that this episode resolved on its own about four years before the accident at Shopko. (Tr. 239:2-17; 629:9-17.) Wendy received no therapy for this incident and no MRI was done. (Tr. 239:2-240:22.) There was no opinion testimony that this incident was related to her injuries. In fact, Defendant's witness, Dr. Colledge, testified that an injury from four years before would not have anything to do with her present back pain. (Tr. 631:24-632:18.)

- Wendy had been in three auto accidents prior to her accident at Shopko. (Tr. 241:2-6.) She complained of neck pain after these accidents. (Tr. 241:7-12.) She was diagnosed with possible herniation of the C7-T1 disc in her 1998 accident. (R. at 1197, 4-5.) Dr. Scuderi testified that neck injury could cause problems in other areas of the spine. (Tr. 393:2-5.)

There was no evidence that she had symptomatic neck pain immediately prior to the accident. (Tr. 410:20-411:2.) These accidents took place in 1998, 2001 and 2003. (R. at 1197, 4-5, 28-29, 45-46.) She never received any treatment for back pain from any of these accidents. (Tr. 241:9-12.) She has never complained of or been treated for neck pain as part of the relevant injuries. (Tr. 377:14-17; 410:20-411:2.) Also, there was no opinion testimony that these accidents were a cause of her pain. (Tr. 393:2-5.)

- There is evidence in Wendy's medical records that she had fibromyalgia sometime prior to the accident. (Tr. 241:19-23; 359:25-360:16; 531: 17-24.) Fibromyalgia can manifest itself in muscle aches and lower back pain. (Tr. 573:9-19; 573:9-19.) Dr. Hogenson testified that Wendy's symptoms are consistent with symptoms for fibromyalgia. (Tr. 361:1-362:11.)

There was no evidence that she had symptomatic fibromyalgia immediately prior to the accident. The records that had "fibromyalgia" written on them include a self-assessment of "achy" and did not indicate that there was a physical examination to confirm the diagnosis. (Tr. 241:19-242:5.) It is not uncommon for doctors to mistakenly use the word fibromyalgia when they just mean muscle aches. (Tr. 241:22-242:3.) Dr. Colledge also testified that fibromyalgia is not well understood and is often misdiagnosed. (Tr. 634:8-17.) The latest record of fibromyalgia is over three years before the accident at Shopko. (Tr. 242:4-17.) Dr. Rosenthal stated that he did not believe that her injuries were due to fibromyalgia. (Tr. 242:18-21.) Dr. Hogenson did not testify that he believes she had fibromyalgia or that it was a cause in any of her injuries. He was not aware of any pain medication or other treatment that she was taking for fibromyalgia prior to the accident. (Tr. 365:5-8.) There was no opinion testimony that fibromyalgia was a cause of her injuries.

- Dr. Colledge testified that Wendy had a suspect annular tear and disc bulge. (Tr. 576:23-577:18.) He observed dessication of Wendy's spinal disks consistent with aging. (Tr. 589:21-590:12.) He testified that it was probable that degenerative disc disease was a cause of this annular tear. (Tr. 641:7-14.) Degenerative disc disease is usually caused by aging. (Tr. 578:19-579:6; 588:21-589:12.) Degenerative disc disease can cause facet joint syndrome and can lead to the symptoms Wendy suffered from. (Tr. 298:6-23; 581:2-582:2; 641:7-20.)

There was no evidence that she had symptomatic degenerative disc disease immediately prior to the accident. Dr. Rosenthal stated that her 2009 MRI had no evidence of degenerative disc disease. (Tr. 308:19-309:1.) The report from Dr. Gardner in 2006 was that he did not see annular tear or degenerative collapse, but "some early degenerative changes consistent with her age." (Tr. 545:7-16.) Three different radiologists looked at her reports and did not note degenerative disc disease, even though that is something that is radiologists routinely report. (Tr. 605:9-610:1.)⁷ The diagnosis of annular tear was never confirmed. (Tr. 593:11-24; 611:22-612:3.) Dr. Colledge testified that facet disease can be brought about by a single incident of trauma, (Tr. 583:7-13) and that he believed that her injuries were at least partly due to trauma. (584:23-25.) In cross-examination, it became clear that he did not know whether it was the L4-L5 disc or the L5-S1 disc that was degenerating. (Tr. 612:4-617:11.) He testified that it was possible that degenerative disc disease was not a cause of her injuries. (Tr. 618:7-12.) Most importantly, Dr. Colledge testified that it is not uncommon for degenerative disc disease to be asymptomatic, then flare up after a traumatic event. (Tr. 641:25-643:7.)

- When asked, Dr. Colledge said he could not testify to a degree of medical certainty that the accident at Shopko caused Wendy's symptoms. (Tr. 574:25-575:6; 585:8-14.)

7. To be fair, the lack of degenerative disc disease on the radiology reports does not mean that it was not present on the MRI films. (Tr. 640:25-641:6.)

There was no indication whether he could not testify to this because the evidence was not there, or if it was because had not done sufficient examination of the causal data. His testimony seems to indicate the latter. Dr. Colledge was asked twice about causation. The first time he said, “No. We just report the news. We don’t make it. We don’t know where it comes from.” (Tr. 575:5-6.) The second time he said, “I can’t. Just, again, identify that the pathology exists. Causation is why you’re here.” (Tr. 585:13-14.) Given that he stated that her injuries were at least partly due to trauma, (Tr. 584:23-25) his failure to testify as to causation cannot be treated as affirmative evidence that the jury could consider alongside Dr. Rosenthal’s testimony as to causation. Finally, even if Dr. Colledge’s testimony were an affirmative statement, it would justify a no-cause verdict for failure to prove causation, not a reduction in award. It therefore cannot be used to justify the verdict.

- Wendy was diagnosed with questionable sciatica before the accident. (Tr. 588:10-14.) Dr. Colledge testified that could potentially play a role in some of her lower back issues. (Tr. 588:10-14.) Dr. Scuderi testified that radiating pain is a symptom of sciatica. (Tr. 392:16-393:1.)

There was no evidence that Wendy had symptomatic sciatica immediately prior to her accident at Shopko. The only report of “questionable sciatica” was in 2002, almost four years before the accident. (Tr. 588:10-14.) There was no expert opinion as to what extent any preexisting sciatica contributed to her injury, or for that matter, that it contributed at all to her injuries. Dr. Colledge testified that she might not have had sciatica at all. (Tr. 632:25-633:9.)

- Wendy indicated that she had arthritis on a 2007 MRI report. (Tr. 353:1-20.) She did not complain to Dr. Hogenson about arthritis as a result of the incident at Shopko. (Tr. 353:21-23.) Degenerative arthritis is the most common cause of SI

joint dysfunction, (Tr. 535:23-536:12) and can cause radiating pain (541:24-542:9) and facet joint syndrome.

There is no indication from the single record where Wendy had arthritis or that she was ever independently diagnosed with arthritis. There was never any evidence put on to show that she was ever diagnosed with degenerative. There was no evidence that she was ever treated or took any medicine for arthritis before the accident at Shopko. There was no evidence that her arthritis had any connection with her injuries. There was no expert opinion as to what extent any preexisting arthritis contributed to her injury, if at all.

- Wendy has had five children. Pregnancy can cause SI joint dysfunction. (Tr. 536:13-18.) Her pregnancies gave her back problems. (Tr. 670:4-15.)

There was no evidence that Wendy had symptomatic SI joint dysfunction immediately before the accident at Shopko. The evidence showed that her back pain went away after she gave birth. (Tr. 670:17-671:5.) There was no expert opinion as to what extent Wendy's pregnancies contributed to her injury, if at all.

- Wendy was previously diagnosed and treated for migraine headaches before the accident. (Tr. 513:16-18.)

Her husband testified that while she had quite a few migraine headaches in the mid to late 1990s, they seemed to go away. (Tr. 671:10-14.) There was no expert opinion as to what extent the migraine headaches contributed to her injury, if at all.

- Wendy was previously diagnosed with depression beginning at age 17; she took Prozac at some time previous to the accident. (Tr. 301:4-15; 362:19-25; 671:15-23.) Dr. Rosenthal sent her to get an assessment for a mood disorder before he treated her. (Tr. 226:15-227:9.)

There is no evidence that Wendy's depression was symptomatic immediately prior to the incident. The latest record that indicates a diagnosis of depression is 2001. (R. at 1197, 82.) Dr. Rosenthal testified that the cause of Wendy's mood disorder was the

accident at Shopko. (Tr. 300:17-20.) He further explained that the purpose for getting the evaluation for the mood disorder was to make sure she was on appropriate medicine, so that he could get a more accurate assessment of the effectiveness of a radio frequency treatment. (Tr. 226:15-227:9; 301:10-302:23.) There was no expert opinion as to what extent preexisting depression contributed to her injury, if at all.

- Wendy had preexisting irritable bowel syndrome before the accident. (Tr. 513:4-24.) This made it difficult for her to handle non-opiate painkillers, which lead to hyperalgesia (increased sensitivity to pain) and increased subjective feelings of pain. (Tr. 514:9-515:16; 520:13-521:2; 626:13-627:6.)

This is not evidence of a preexisting condition, as it did not directly contribute to her pain. Rather, Wendy's inability to use aspirin and other anti-inflammatory drugs was an "eggshell skull" condition—but for Defendant's negligence, she would not have to take the medicines. Regardless, there was no expert opinion as to how much of her injury was due to irritable bowel syndrome, if any.

Because there was no relevant affirmative evidence that there were symptomatic preexisting conditions, and no evidence that would provide a reasonable basis for apportionment of damages, the jury's award is not supported by the evidence. This Court should therefore reverse the trial court's decision.

C. The round amounts of the awards for past and future damages indicate that the jury award was arbitrary and not based on the evidence.

Besides the lack of evidence that would support reducing the amounts of economic damages, the round amounts of the awards suggest that the jury did not decide which expenses were or were not compensable and add them together, but rather chose a number arbitrarily. A jury verdict that appears to have arbitrarily chosen an amount for an award of economic damages is based on insufficient evidence. *See Judd v. Rowley*, 611

P.2d at 1221 (holding that the jury was in error for reducing Plaintiff's award for economic damages without an evidentiary basis). There is simply no combination of figures presented to the jury that could total \$15,000.00 in present damages. Because the parties stipulated to the reasonableness of the amounts, the jury did not have discretion to reject that stipulation and decide that other numbers were more reasonable. The jury verdict is therefore not based on sufficient evidence and this Court should reverse the trial court's decision.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN NOT ORDERING A NEW TRIAL FOR DAMAGES, AS THE JURY'S AWARD OF \$1,000 FOR NONECONOMIC DAMAGES IS INADEQUATE AND APPEARS TO HAVE BEEN GIVEN UNDER PASSION OR PREJUDICE.

Utah appellate courts have stated that a jury award should be set aside for passion and prejudice when the award appears to have no basis in fact and is shocking to the conscience. *See Stamp v. Union Pacific Railroad Co.*, 303 P.2d 279, 282 (Utah 1956). Given the overwhelming evidence of pain and suffering in this case, the jury award of \$1,000.00 cannot be sustained as within the zone of reasonableness.

As a comparison, consider the Utah Supreme Court's decision in *Robinson v. All-Star Delivery Inc.* As in this matter, the plaintiff in *Robinson* was awarded \$1,000.00 in general damages. *See* 1999 UT 109 ¶ 8. However, the similarities end there. In *Robinson*, the plaintiff only suffered \$3,800.00 in economic damages. *See id.* ¶ 4. The plaintiff testified that while he felt pain in his neck, back and leg after the accident, the neck pain resolved after a two weeks, and the leg pain resolved one year later, after he underwent a surgery that was recommended before the accident giving rise to the suit. *See id.* ¶ 7. He further testified that while his back pain still existed three years later, the pain had not

caused him to miss work, did not interfere with most major life activities, and did not warrant the expense of epidural injections that would have been 70-80% successful in reducing his back pain. *See id.* The plaintiff stopped seeing his doctor one month after the accident, and stopped going to physical therapy three months after the accident. *See id.* The plaintiff's doctor rated the severity of his back sprain as one out of four, one being the most mild. *See id.* ¶ 5.

Notwithstanding the paucity of the evidence of pain and suffering, the Utah Supreme Court stated that because there was conflicting evidence as to whether the damage caused by preexisting injuries was apportionable, there was a reasonable likelihood that if the jury did not believe that they were required to apportion damages to a preexisting injury, they may have awarded more in general damages. *See id.* ¶ 18.

The decision in *Robinson* compels reversal in this case. Looking at the record evidence listed above in the Statement of Facts, it is uncontested that Wendy was in severe pain for nearly three years that significantly interfered with her quality of life, her social and community involvement, and her relationship with her husband and family. While Dr. Rosenthal's treatments have improved her quality of life, she has suffered permanent injuries that will impair her daily function and are likely to continue to cause her pain. There is no reasonable jury that could evaluate Wendy's pain and suffering as only worth \$1,000.00. Because the judgment shocks the conscience, this Court should grant a new trial.

Trial Evidence. Pursuant to Utah R. App. P. 24(a)(9), Plaintiff hereby marshals the following record evidence that could be construed in favor of the jury's decision with respect to the amount of her pain and suffering:

- Wendy did not ask for help with Bridger when she was filling out the accident report with an employee at Shopko after the accident; she did not request an ambulance or further medical care at Shopko. (Tr. 721:6-19.) After the accident, she drove home from Provo in rush hour traffic. (Tr. 721:25.) Wendy did not seek medical care until the next day, and that was for abdominal pain, not lower back pain. (Tr. 722:1-12.)

Bridger was in the cart during Wendy's time at Shopko, so she did not need anyone to hold him. (Tr. 721:8-10.) Wendy stated that she was embarrassed and just wanted to leave Shopko as quickly as possible. (Tr. 694:12-695:23.) She was shaken, and the intense pain did not set in immediately. (Tr. 695:15-696:23.) She also testified that she did not want to go to the doctor, as she had no insurance. (Tr. 697:6-14.) The uncontested evidence was that pain takes time to localize. (Tr. 244:9-23; 379:18-21.)

- At the trial, Wendy sat for an hour through her testimony, and sat through the hearings and did not request a break. (Tr. 725:14-726:25.)

Prior to trial, Wendy received treatment that reduced her pain. (Tr. 709:11-710:16.) She gave her testimony at what she described as her "best time of day," so she was able to deal with sitting for a while. (Tr. 725:21-22.) She testified that it was difficult to sit past noon, but suffered through it as she was told not to interrupt the proceedings. (Tr. 726:5-25.) Her willingness to show decorum should not be counted against her.

- Wendy could still clean the house, take Bridger to preschool, and perform other aspects of her daily routine. (Tr. 727:7-730:16.)
- Wendy could still take the kids to the playground and visit friends after the accident. (Tr. 661:16-22.)
- Wendy would occasionally drive to doctor's appointments. (Tr. 659:25-331:2; 683:17-684:14.) There was testimony that she rode in the car to Las Vegas, Fillmore, and Eden after her accident. (Tr. 662:13-664:3; 730:21-732:8.)

- There was evidence that while on vacation in Eden, Wendy watched movies, soaked in the hot tub, read books with her friends, and walked around property in the snow. This was after her accident. (Tr. 662:13-664:3.)

Wendy's testimony was that she had good days and bad days. She would try to stay active and deal with the pain, but sometimes it was not possible. (Tr. 674:2-6; 699:15-700:23; 727:7-730:16.) However, even if the pain did not make her an invalid, the uncontested evidence was that she suffered a great deal and that the injury caused major changes in the quality of her daily life, (*see supra* at 7-8) which she should be compensated for.

- Dr. Colledge testified that Wendy reported working out every day after the accident. (Tr. 592:3-9.)

Dr. Colledge further testified that he did not know what Wendy meant when she said that she was working out every day. (Tr. 635:12-636:12.) The "working out" that she referred to was not strenuous physical labor, but rather the physical therapy she was doing for an hour each day. (Tr. 705:15-707:19.)

- Wendy's condition did not start to deteriorate until three months after the accident. (Tr. 683:5-16.)

The uncontradicted testimony was that, although Wendy was in pain, she tried for a time to keep her normal schedule. She finally had to give up. (Tr. 683:5-16; 699:25-701:19.)

- Dr. Colledge testified that Wendy's pain was objectively not as severe as she reports. (Tr. 626:13-627:6; 639:25-640:9.)

Dr. Rosenthal testified that all pain is subjective. (Tr. 215:3-4.) Dr. Colledge cannot measure a person's pain, and the study he cited to was not specific to Wendy. (Tr. 20-25.) Dr. Colledge admitted Wendy's pain was real. (Tr. 601:6-602:13; 626:16-17;

639:25-640:4.) The reason that he stated her pain complaints were more severe was because of hyperalgesia, caused by physical dependence on her pain medication. (Tr. 626:13-627:6.) There was no evidence that Wendy was suffering from hyperalgesia—Dr. Colledge’s statements were not based on an examination or anything other than speculation. Dr. Hogenson testified that Wendy’s dose of pain medication stayed stable while he was treating her, (Tr. 347:16-348:5) leading one to believe that her tolerance had not increased to the point of hyperalgesia. Further, Dr. Rosenthal testified any physical dependence on her pain medicine was proximately caused by the accident at Shopko. (Tr. 254:23-255:14.)

Wendy suffered a great deal of pain and reduction in quality of her life as a proximate result of Shopko’s negligence. The jury’s award of \$1,000.00 as total compensation for that pain and suffering is so low as to shock the conscience. Therefore, this Court should reverse the trial court’s decision and remand for a new trial on general damages.

III. THE TRIAL COURT ERRED IN EXCLUDING PORTIONS OF PLAINTIFF’S DEPOSITION TRANSCRIPT FROM EVIDENCE, AS THEY WERE OFFERED BY PLAINTIFF FOR PURPOSES OF CLARIFYING OTHER PORTIONS OF PLAINTIFF’S DEPOSITION TRANSCRIPT INTRODUCED INTO EVIDENCE BY DEFENDANT.

A. Exclusion of deposition evidence offered to clarify other portions of the transcript read into evidence is harmful error.

Rule 32(a)(4) of the Utah Rules of Civil Procedure provides that “[i]f only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.” *See also* Utah R. Evid. 106. A court’s discretion to exclude such evidence is limited to determining whether the portions

requested to be read into the record are “relevant and necessary to qualify, explain, or place into context the portion already introduced.” *See State v. Leleae*, 993 P.2d 232, 242 (Utah App. 1999).

There is no question that the portions of the deposition that Plaintiff attempted to read into the record were relevant to put Defendant’s statements into context. Defendant introduced Plaintiff’s deposition testimony to impeach her statements at trial—to suggest that Plaintiff’s trial testimony was inconsistent with her testimony at her deposition. (*See supra* at 12-13.) Plaintiff was entitled to bring in the rest of the statement that showed that her deposition testimony was in fact consistent with the testimony she was giving at trial, and the Court was in error when it refused the admission of that evidence.

Excluding the portion of Plaintiff’s deposition transcript unfairly prejudiced Plaintiff by (1) not allowing her to rehabilitate her credibility, and (2) wrongfully suggesting that her prior testimony was that she was not limited in caring for her household, and thus not significantly injured. Evidence of that prejudice is illustrated in the excessively low amount of damages awarded by the jury. Regardless of the opportunity for the Plaintiff to testify as to what she meant by her deposition testimony, it is very likely that a jury would perceive that Plaintiff was engaging in post-hoc justifications and trying to spin adverse testimony, and would therefore give much less weight to that testimony than to her deposition testimony. Absent the Court’s error, there is a reasonable likelihood that the jury would have given more weight to Plaintiff’s testimony and realized her significant limitations on caring for her household, resulting in a higher award of damages.

B. Plaintiff properly preserved her assignment of error below.

In its written ruling, the trial court agreed that excluding the deposition testimony would have been prejudicial error, but it denied that it had disallowed the evidence. The court stated that it had just “directed Plaintiff’s counsel that he could ask Ms. Harris a question about the transcript.” Because Plaintiff did not ask such a question, the trial court reasoned, “any prejudice . . . is not attributable to the Court.” (R. at 1135.) However, Plaintiff’s counsel believed that the trial court’s direction to ask questions meant that he had to clarify the deposition testimony without reading in the deposition transcript itself. (R. at 929.) Whether this assignment of error is properly before this Court should turn on whether Mr. Day reasonably believed that the court ruled that he could not introduce the deposition transcript, and actually relied upon that belief to his detriment. *See State v. Dunn*, 850 P.2d 1201, 1220 (Utah 1993) (viewing an ambiguous oral ruling, for purposes of error, as the appellant believed the lower court held); *Williams v. Barber*, 765 P.2d 887, 890 (Utah 1988) (remanding for new trial because Plaintiff erroneously assumed, based on an ambiguous ruling of the lower court, that he had met his burden of proof on causation).

The trial record reveals that the lower court’s ruling was ambiguous and that Mr. Day’s interpretation was reasonable. The exchange is reproduced below:

Q. [by Mr. Day] I want to redirect you to page 29 of your deposition, and Ms. Shapiro read the question that starts on line eight, and then she read the answer, but she stopped halfway through. So I thought I would read that whole thing and include—in fact, why don’t we do this. Why don’t I read the question—

A. [Wendy Harris] Okay.

Q. —and then you can read the full answer, so that we just don’t have half of that answer. Okay?

MS. SHAPIRO: Your Honor, I don’t believe this is the proper use of a deposition. I actually haven’t heard a question yet.

MR. DAY: I am simply trying to—this is sworn testimony, Your Honor, and I’m trying to put into context what Ms. Shapiro has read into the record, and Ms. Shapiro has left something out that was in the exact answer. I think I have a right to show what her full answer was.

MS. SHAPIRO: Your Honor, I don’t appreciate the inference. My use of the deposition was for impeachment purposes, which is a proper purpose of the use of the deposition. If Mr. Day would like to clarify, I believe he needs to pose a question.

THE COURT: Sustained. You can ask her a question.

MR. DAY:⁸ Okay. Wendy, let me just ask you this. I withdraw the questions. Nothing further, Your Honor.

(Tr. 732:24-734:3.)

Mr. Day’s belief that the trial court was sustaining a substantive objection rather than an objection to form was reasonable. Ms. Shapiro’s objection was to an “improper use of a deposition,” which is a substantive objection. Mr. Day stated his purpose in using the deposition, and what he was trying to do. The court did not clarify what its ruling was, or what objection it was sustaining.⁹ Mr. Day abandoned the line of questioning, which, given Mr. Day’s stated purpose of reading in the rest of the deposition answer, was a clear sign that he understood the court’s ruling to be substantive rather than formal. However, the court did not inquire or otherwise attempt to clarify any misunderstanding. Given these factors, even if Mr. Day misunderstood the Court’s ruling, his interpretation would be reasonable. The issue is therefore properly preserved for appeal.

8. The record mistakenly attributes this statement to Ms. Shapiro.

9. Also, given the fact that Rule 32(a)(4) indicates that the parts of the deposition be “introduced,” it is not clear that Mr. Day was proceeding improperly. *See also* Thomas A. Mauet, *Trial Techniques* 159-60 (6th ed. 2002) (discussing the reenactment method of introducing depositions). The trial court sustaining an objection to a common form of introducing a deposition would create further confusion as to what the ruling actually was.

IV. THE TRIAL COURT ERRED IN EXCLUDING THE CHAIR SPECIFICATION SHEET FROM EVIDENCE, AS ITS FOUNDATION WAS ADMITTED TO AND DEFENDANT FAILED TO OBJECT TO THE DOCUMENT WHEN IT WAS SUBMITTED IN PRETRIAL DISCLOSURES.

A. Foundation for the document was established by Defendant's admissions.

The trial court's refusal to admit the exhibit for lack of foundation was improper because Defendant had previously admitted to foundation. The proper amount of foundation required for a document to be admissible into evidence is that there is some evidence that the document is what the party introducing the document purports it to be. *See* Utah R. Evid. 901(a); *State v. Jacques*, 924 P.2d 898, 900-01 (Utah App. 1996); Edward L. Kimball & Ronald N. Boyce, *Utah Evidence Law* § 9-1 (1996). Adequate foundation was established by Defendant's Admissions. (*See supra* at 13.) Because an admission conclusively establishes a fact for purposes of the litigation, *see* Utah R. Civ. P. 36(b), it was conclusively established that the specification sheet was accurate, or to put it another way, that the specification sheet was what it purported to be. The exclusion of the specification sheet was therefore in error.

B. Defendant waived any objection to foundation by failing to object to Plaintiff's pretrial disclosures; the trial court abused its discretion in withdrawing that waiver, as Defendant failed to show good cause.

The trial court's refusal to admit the exhibit for lack of foundation was also improper because any foundational objection had been waived and there was no good cause for excusing the waiver. The Utah Rules of Civil Procedure require that a party intending to object to an exhibit disclosed during pretrial disclosures must make that objection within 14 days of the disclosure or the objection is waived. *See* Utah R. Civ. P.

26(a)(4). As the federal courts have explained in interpreting the federal analog to this rule, the purpose of this rule is to waive foundational objections:

Authentication also can be accomplished in civil cases by taking advantage of Fed. R. Civ. P. 36, which permits a party to request that his or her opponent admit the “genuineness of documents.” . . . Similarly, if a party properly makes his or her . . . pretrial disclosures of documents and exhibits, then the other side has fourteen days in which to file objections. Failure to do so waives all objections other than under Rules 402 or 403, unless the court excuses the waiver for good cause. This means that if the opposing party does not raise authenticity objections within the fourteen days, they are waived.

Lorraine v. Markel American Insurance Co., 241 F.R.D. 534, 553 (D. Md. 2007). This rule stands to reason, as the point of pretrial disclosures is to allow the parties to adequately prepare for the trial, including receiving fair notice about what foundational testimony they will need to produce.

The trial court’s decision to excuse Defendant’s waiver of the foundational objection was an abuse of discretion. Rule 26(a)(4) allows a trial court to excuse a party’s waiver of an objection under the rule “for good cause shown.” Good cause for excusing a party’s failure to object to the foundation of an exhibit disclosed in pretrial disclosures follows the contours of any other “good cause” balancing test—the party requesting relief would bear the burden of offering a reasonable excuse for its lack of diligence, and the Court balances those considerations with the risk of prejudice to the other party. *Cf. Rohan v. Boseman*, 2002 UT App. 109, ¶ 28, 46 P.3d 753 (analyzing dismissal for failure to prosecute under Rule 41); *Katz v. Pierce*, 732 P.2d 92, 93 n.2 (Utah 1986) (analyzing setting aside a judgment under Rule 60(b)).

Because the trial court’s decision to excuse Defendant’s waiver is reviewed for abuse of discretion, Plaintiff is obligated to marshal the evidence in support of the judge’s

discretion under Utah R. App. P. 24(a)(9). The following is the record evidence in favor of the trial court's decision:

- The witness on the stand when Plaintiff attempted to introduce the evidence was not competent to testify to its foundation. (Tr. 438:3-11.)

The fact that the witness was not competent to lay the foundation does not constitute good cause to excuse the waiver. The very point of the waiver rule is so that the party does not have to call a witness to lay foundation. Holding that lack of evidence of foundation at trial excuses a waiver of an objection to foundation is a vicious circle that would make Rule 26(a)(4) a dead letter. This fact is also irrelevant as to the issues raised by good cause—excusable neglect and possible prejudice.

- The parties stipulated to the admission and foundation of several exhibits before trial. This document was not among those exhibits. (Tr. 439:14-25; 441:12-21.)

The fact that the parties stipulated to certain evidence does not excuse a party from timely filing objections to evidence that was not stipulated to. One of the purposes of requiring disclosure of objections is that the party introducing the evidence knows what objections the other side has and can prepare to meet those objections at trial. Even if parties stipulate to some exhibits, this does not obviate the party opposing non-stipulated evidence to state the nature of its objections beforehand. There may be good cause for excusing the filing of a formal objection if the introducing party actually knows that the other party has a good-faith concern over the admissibility of the evidence. However, this was not the case in this matter. Defendant's Counsel was very familiar with the exhibit in question and has never brought up any question as to the accuracy or authenticity of the specification sheet. (R. at 431:20-431:11; 435:8-16; 436:23-437:3; 439:22-440:7.)

Plaintiff knows of no good-faith dispute as to the authenticity of the document. Defendant therefore would not have been prejudiced by the admission of the specification sheet.

However, Plaintiff was unfairly prejudiced because she relied on Defendant's admission and its failure to object to the exhibit, and so did not prepare foundational evidence for the exhibit. Requiring a foundational witness to be produced after Defendant had waived that objection outweighed any possible prejudice to Defendant that introducing the exhibit would have caused. Therefore, good cause for excusing Defendant's failure to object was not shown.

C. The exclusion of the specification sheet was harmful error.

This error is harmful because the only statement that the jury heard about the height of the chair was Counsel for Defendant's (unsworn and improper) statement during her opening that the chair could adjust to a maximum height of 19 inches. (Tr. 189:12-23.) The manufacturer's specification sheet shows that the chair could actually adjust to a maximum height of 21.25 inches. (R. at 963.) It is reasonably likely that the jury would have given more weight to Plaintiff's injury had they heard testimony that she could have fallen from 21.25 inches than 19 inches, and would have awarded greater damages.

Further, when Counsel for Defendant stated that the chair could adjust to a maximum height of 19 inches, she was improperly testifying and putting her own credibility at issue. Plaintiff had two options to deal with the improper statements of Defendant's counsel: she could either object, or, since Defendant's counsel put her credibility at issue in improperly testifying, she could introduce evidence that would cast doubt on the credibility of Defendant's counsel. It is extremely likely that if Plaintiff had

been allowed to present this evidence, the jury would have had serious doubts as to the credibility of Defendant's counsel and would have awarded a greater amount in damages as a result. By denying Plaintiff the opportunity to call into question Counsel for Defendant's credibility when she put that credibility at issue was unfairly prejudicial. It is reasonably likely that without this error, the jury would have awarded a greater amount of damages.

V. THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY TO REDUCE FUTURE DAMAGES TO PRESENT VALUE, AS DEFENDANT OFFERED NO EVIDENCE TO PROVIDE A BASIS FOR THE JURY TO REASONABLY CALCULATE THE PRESENT VALUE OF FUTURE MEDICAL EXPENSES.

Utah law provides that once a plaintiff has presented a prima facie case, it is the defendant's burden to give evidence that would reduce recovery. *See John Call Engineering Corp. v. Manti City Corp.*, 795 P.2d 678, 680 (Utah App. 1990) ("It is not a plaintiff's burden to produce the evidence on which any reduction of damages is to be predicated."); *see also Ault*, 739 P.2d at 1120-21 (allocating on defendant the burden to show that an alternate method of valuation would lead to reduced recovery). The trial court correctly ruled upon this issue below in a pretrial order, holding that "proof of the reduction of future damages to present value is the defendant's burden It is the defendant, after all, that benefits from the reduction of future damages to present value." (R. at 380.)

However, the allocation of burdens on this issue would be meaningless if no evidence were required to be presented. This Court has previously stated that "the required calculation [to determine present value] is almost impossible for a jury without assistance." *Gallegos v. Dick Simon Trucking, Inc.*, 2004 UT App. 322, ¶ 11, 110 P.3d

710. While expert testimony is not necessary, competent evidence of present value, such as an annuity table or some similar actuarial table, must be introduced into evidence to assist the jury in making the calculation. *See Bennett v. Denver & Rio Grande W. R.R. Co.*, 213 P.2d 325, 328 (Utah 1950). Without some evidentiary basis to guide the jury, its reduction of damages would be completely arbitrary.

In this case, there was absolutely no evidence of any kind that would have instructed the jury on how to make a present value calculation. Because the burden to produce that evidence was on the Defendant, its failure to present the evidence constitutes a waiver of the present value theory of reducing damages. *Cf. Gill v. Timm*, 720 P.2d 1352, 1354 (Utah 1986) (holding that a defendant's failure to present evidence of mitigation at trial waived the defense). Because the trial court instructed the jury on reducing future damages to present value when Defendant had waived the theory, the jury likely reduced the future damages when they should not have. Further, because the jury had absolutely no guidance about how to reduce future damages, there is a reasonable likelihood that they overestimated the amount of reduction, meaning that Plaintiff's award would have been higher. The reasonable likelihood of harm is supported by the disparity between the ample evidence of future economic damages presented at trial and the amount of future damages that the jury actually awarded. The trial court's error prejudiced Plaintiff, justifying a new trial.

VI. THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY REGARDING APPORTIONMENT OF DAMAGES BETWEEN THE INJURIES CAUSED BY DEFENDANT AND SYMPTOMATIC PREEXISTING CONDITIONS, AS THERE WAS NO EVIDENCE OF SYMPTOMATIC PREEXISTING CONDITIONS AND NO EVIDENCE THAT WOULD SUPPORT A REASONABLE BASIS FOR APPORTIONING DAMAGES.

The arguments in favor of this assignment of error are well briefed in Point I.A-B, *supra* at 19-30. Because Defendant presented no evidence that would provide a reasonable basis for determining the portion of damages attributable for each injury, and there was no evidence of *symptomatic* preexisting conditions, the jury instruction was inappropriate. It is reasonably likely that the jury made such a reduction. In fact, this places Defendant in a double bind; the more evidence of preexisting conditions it points to, the more likely that the jury used this evidence to make an arbitrary reduction in Plaintiff's damages. Instructing the jury regarding apportionment was harmful error.¹⁰

VII. THE TRIAL COURT IMPROPERLY ALLOWED DR. COLLEDGE TO TESTIFY THAT PLAINTIFF HAD A PSYCHOSOMATIC WEAKNESS THAT DELAYED HER RECOVERY TIME AND INCREASED HER PAIN AND SUFFERING BEYOND THAT OF AN AVERAGE PERSON, AS THE TESTIMONY WAS IRRELEVANT TO THE ISSUE OF DAMAGES, WAS IRRELEVANT TO WENDY'S CONDITION, AND WAS MORE PREJUDICIAL THAN PROBATIVE.

A. *A psychosomatic weakness that delays recovery is not relevant to the issue of damages, and is much more prejudicial than probative—the admission of the evidence was harmful error.*

Some medical researchers have recognized the phenomenon of accident victims taking longer to recover than non-accident victims, and have referred to this pathology in

10. Contrary to the trial court's argument, (R. at 1129) *Robinson v. All-Star Delivery* does not support its conclusion to give the jury instruction. In *Robinson*, there was conflicting testimony as to damages—one expert testified that the plaintiff's injuries were caused by the accident at issue in the case, and another testified that the plaintiff's injuries stemmed from a previous accident. 1999 UT 109, ¶¶ 5-6. In this case, there has been no expert testimony that any of the preexisting conditions caused Wendy's injuries. Further, the issue in *Robinson* was not whether to submit the instruction about reduction in damages due to symptomatic preexisting conditions, but rather whether that instruction would include a sentence about what to do if the jury could not reasonably apportion damages. *See id.* ¶ 10. The question for the lower court was whether there was evidence that would allow a jury to conclude that the damages were not apportionable. *See id.* ¶¶ 14-15. The question in this matter is whether there was evidence presented that would allow a jury to conclude that the damages *were* apportionable.

various terms, including “litigation neurosis,” “compensation neurosis,” “Accident Victim Syndrome,” among many other terms.¹¹ Regardless of the name they use, these researchers generally agree that this phenomenon is (1) unconscious, (2) a psychosomatic response to psychological distress relating to perceived lack of control, feelings of blame and retribution, and the stress attendant to litigation, and (3) tends to continue to manifest itself even after litigation ends.¹²

Evidence that Plaintiff was suffering from a condition, common to all accident victims, that slowed her recovery is not relevant to the issue of damages. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Utah R. Evid. 401. A fact can only be of consequence to Defendant’s case against damages if that fact could be used to justify decreasing or barring Plaintiff’s recovery. The evidence at issue here cannot be used in such a way, and so should have been excluded. *See* Utah R. Evid. 402.

Utah law states that a tortfeasor “takes the injured as [it] finds [her].” *Ryan v. Gold Cross Svc., Inc.*, 903 P.2d 423, 428 (Utah 1995). This includes any physical or mental

11. One researcher has compiled a list of thirty-six different names used to describe this pathology. See George Mendelson, “*Compensation Neurosis*” *Revisited: Outcome Studies of the Effects of Litigation*, 39 J. Psychosomatic Research 695, 696 (1995).

12. *See, e.g.*, Edward B. Blanchard, et al., *Effects of Litigation Settlements on Posttraumatic Stress Symptoms in Motor Vehicle Accident Victims*, 11 J. Traumatic Stress 337, 337-40, 349-53 (1998); George Mendelson, “*Compensation Neurosis*” *Revisited: Outcome Studies of the Effects of Litigation*, 39 J. Psychosomatic Research 695, 695-98 (1995); Rodger L. Wood, *Understanding the “Miserable Minority”: A Diathesis-Stress Paradigm for Post-Concussional Syndrome*, 18 Brain Injury 1135, 1144-46 (2004); Rodger L. Wood & Neil A. Rutterford, *The Effect of Litigation on Long Term Cognitive and Psychosocial Outcome After Severe Brain Injury*, 21 Archives Clinical Neuropsychology 239, 239-40 (2006).

weakness that would make the victim particularly susceptible to injury or cause the victim to heal more slowly than an average person. *See* 22 Am. Jur 2d. *Damages* § 239 (2009). The Court of Appeals for the District of Columbia Circuit explained this rule's applicability to psychosomatically caused or prolonged injuries:

A plaintiff cannot recover for pains that are "imaginary" in the sense that they are consciously fabricated. But a person who has received physical bodily injury by the wrongful act of another can recover for pains resulting from that injury that are "imaginary" in the sense that such pains are not due to organic ailment but are psychosomatic in origin, and are due to the impact of the injury upon or in aggravation of a preexisting neurotic or psychic weakness.

Bourne, 441 F.2d at 1026.

Additionally, even if Plaintiff's injuries were prolonged by litigation or having her injuries caused by Defendant rather than as a result of her own acts, Plaintiff's recovery would not be reduced, as these are foreseeable consequences of Defendant's negligence. *See Godesky v. Provo City Corp.*, 690 P.2d 541, 545 (Utah 1984) (holding that an intervening act does not relieve the tortfeasor of liability if the act is foreseeable). This is especially true if, as Dr. Colledge testified, "we all have it." (Tr. 554:12.)

Even if it was a fact that Plaintiff suffered from "delayed recovery syndrome," it was a fact that could not reduce recovery. It was therefore irrelevant and should have been excluded. Also, even if the Court finds some relevance or probative value in Dr. Colledge's testimony, it would be substantially outweighed by the risk of unfair prejudice, and so would be inadmissible under Rule 403 of the Utah Rules of Evidence.

This error was unfairly prejudicial to Plaintiff for several reasons. First, allowing Defendant to introduce this evidence strongly suggested to the jury that Plaintiff's damages should be reduced to the amount of time that a "reasonable person" should have

recovered. In fact, Defendant's closing argument makes it clear that this was the purpose of the evidence:

He made this great analogy to the dented fender syndrome where if I run into—if I'm going the speed limit and I happen to run into a fixed object and dent my own car, I don't really have that big deal about it because it's my fault. But if somebody else, if he took his Mercedes and hit my Honda, I'm going to have more of a problem with that, and it's going to be engrained in my head and that leads to something called delayed recovery. Once somebody thinks somebody else is at fault, the studies have shown, which Dr. Colledge has published, that people just don't recover as quickly as they should or don't recover at all.

(Tr. 993:17-994:4.) Therefore, it is likely that the jury actually reduced their award of economic damages in response to this evidence. The fact that the jury awarded only 35% of Plaintiff's claimed economic damages, despite the fact that there was no evidence that those expenses were not reasonably incurred, supports this conclusion. Second, this evidence was reasonably likely to cause the jury to give less weight to Ms. Harris's testimony regarding her pain. This evidence reinforced the stereotype of a personal injury plaintiff as a conscious malingerer or hypochondriac. The ridiculously low amount of general damages supports the likelihood of this scenario. This error was harmful and warrants a new trial.

B. Even viewing the evidence in the light most favorable to the trial court's discretion, allowing testimony of Plaintiff's "delayed recovery" was an abuse of discretion.

Because the trial court's decision to admit Dr. Colledge's testimony is reviewed for abuse of discretion, Plaintiff is obligated to marshal the evidence in support of the judge's discretion under Utah R. App. P. 24(a)(9). The following is the record evidence that could be construed in favor of the trial court's decision:

- Dr. Colledge testified that Wendy's soft tissue injury should have healed within two to three weeks; any pain after that point would be chronic rather than acute. (Tr. 586:10-19.) Chronic pain and acute pain are different and must be treated differently, saying that "if we treat [chronic pain] like acute pain, it becomes debilitating. It limits their quality of life. Their whole life evolves around pain." (Tr. 584:12-20.) He further explained that that passive treatments like pain medication, massage therapy or chiropractic care may give short-term relief, but the only way to actually see long-term relief from chronic pain is "to get the joint stronger, improve endurance, modify activities, and maybe you can take some anti-inflammatories to help with that at the time." (Tr. 594:10-19.)

These two statements were cited by the trial court as reasons why delayed recovery was relevant, arguing that it creates a question of fact as to whether the care that Wendy received was necessary and whether the pain was caused by the accident. (R. at 1127.) However, these statements were made entirely out of the context of delayed recovery and long before the concept was introduced to the jury.¹³ There was no testimony about how a diagnosis of delayed recovery would change the recommended course of treatment. There was never any attempt by Defendant to link up the concept of delayed recovery to causation or the necessity of treatment during the examination, and Dr. Colledge did not render an opinion as to the relevance of delayed recovery to treatment of Wendy's chronic pain.

Dr Colledge also did not testify as to the reasonableness of her course of treatment in dealing with chronic pain. Dr. Colledge admitted that there are instances where passive treatments such as pain medication would be appropriate to improve a patient's function. (Tr. 627:9-629:5.) He did not render an opinion about whether pain medicine was appropriate in Wendy's case. However, Dr. Rosenthal, a board-certified pain

13. The concept of delayed recovery was introduced at the end of Dr. Colledge's direct examination. (Tr. 597:1-600:5).

management specialist, testified that the course of treatment was reasonably necessary for dealing with her chronic pain. (Tr. 245:18-246:14.)

Finally, Defendant previously used this evidence to argue that because Wendy's pain should have resolved within two to three weeks, the delayed recovery rather than the accident caused her pain. (R. at 1041-1040.) This argument confuses a preexisting condition with a propensity for injury. Wendy was asymptomatic before the accident—even if she had a somatoform disorder that caused her to experience chronic pain, that disorder was lit up by the accident, and so Defendant cannot escape causation.

Because the above evidence does not deal with the concept of delayed recovery and there was no testimony explaining how delayed recovery made Wendy's course of treatment not reasonably necessary, the testimony was not relevant.

- Dr. Colledge stated that part of the consequences of delayed recovery was that patients will self-report that “marginal treatments” such as acupuncture, naturopathic treatment, and chiropractic care cured them, but the objective data does not show an increase in function over the patient's state prior to that treatment. (Tr. 636:22-640:12.)

This statement is also not relevant. Contrary to Dr. Colledge's scenario, Wendy did not receive a marginal therapy (as he defined it) from Dr. Rosenthal, but rather one based on experimental data and accepted medical science. (Tr. 224:24-229:25; 249:7-25.) Wendy actually had an improvement in function and quality of life after the treatment. (Tr. 231:14-17; 680:14-23; 709:16-710:16.) Because the testimony regarding delayed recovery was more prejudicial than probative, the trial court abused its discretion in allowing the testimony into evidence.

C. The instruction given to the jury did not cure the prejudice.

The lower court argued in its decision that any prejudice would have been cured by instructing them about the eggshell plaintiff rule.¹⁴ This was a standard instruction, given during the final jury instructions before the jury was sent off to deliberate. This instruction did not cure the prejudice that Plaintiff suffered as a result of the introduction of the testimony regarding delayed recovery.

First, the instruction was not introduced as a curative instruction, and was not given in response to or in the context of delayed recovery. This Court has previously ruled that incorrect rulings on vital issues are “not cured by a prior unexceptional and unilluminating abstract charge.” *State v. Turner*, 736 P.2d 1043, 1045 (Utah App. 1987).

Second, expecting the jury to weed out irrelevant information on its own based on standard jury instructions is unrealistic, and misunderstands the role of the judge *vis-à-vis* the jury. It is not the jury’s role to determine the relevance of certain facts. To rule otherwise would negate the entire purpose of Utah R. Evid. 401-403.

VIII. THE TRIAL COURT IMPROPERLY ALLOWED COUNSEL FOR THE DEFENDANT TO ELICIT TESTIMONY THAT DR. ROSENTHAL’S EXPERT REPORT WAS DRAFTED BY COUNSEL FOR PLAINTIFF, AS THE TESTIMONY WAS IRRELEVANT AND HIGHLY PREJUDICIAL.

A. Allowing the testimony was harmful error.

Rule 26(a)(3)(B) of the Utah Rules of Civil Procedure explicitly allows for either the expert or the party to prepare and/or sign the expert report. The Advisory Committee Note offers this explanation:

Unlike the Federal Rules of Civil Procedure, an expert’s report need not be written and signed by the expert. The report may be signed by the witness or the party The committee considered but decided not to adopt the federal rule governing expert reports. Both plaintiffs’ attorneys and defense attorneys

14. The trial court’s jury instruction is located at Tr. 944:25-945:6.

reported on the high cost of reports by experts, the growth of non-practicing experts as a profession, and the need to depose experts regardless of a written report.

Utah R. Civ. P. 26, Advisory Committee's Note. Allowing a jury to consider the issue of who actually prepared the final version of the expert report would frustrate the policy objectives of the Advisory Committee by calling into question any report that was not prepared by the expert herself. Even though a party could technically avail herself of this rule, knowing that the expert report would be disparaged by the opposing attorney would prevent most parties from preparing expert reports themselves.

Additionally, the question of who drafted an expert report is simply not relevant as to the credibility of an expert witness. The expert report is a summary of the testimony and opinions of the expert, and she is not allowed to testify in variance of the report. *See id.* The opposing party has ample opportunity to examine the credibility of the expert on the basis of her opinions, her qualifications, and her conclusions, and whether the opinions in the report are her opinions. The issue of who drafted the expert report, however, goes to none of these issues directly, but merely implies that the expert's opinion was coached without providing any real evidence to support that implication. Allowing a party to bring up that the opposing expert did not actually draft the final version of the report is akin to allowing a party to bring up that the opposing party's attorney actually chose the wording to the answers to the interrogatories rather than the party herself—it disparages the credibility of the witness in the mind of a lay jury that does not understand that this is a commonly accepted practice in the legal community.

In this case, Dr. Rosenthal personally reviewed and signed the expert report. Defendant had ample opportunity to question him as to whether the opinions were his,

and to elicit further explanations from him that would draw out any evidence that he did not understand the report or that he did not agree with the report. Allowing Defendant to go further and to make an argument by innuendo was improper and unfairly prejudicial.

It is reasonably likely that the jury, after hearing that Dr. Rosenthal did not draft his own report, assigned less weight to his evidence than they otherwise would have. This is especially true since Defendant emphasized this fact in her closing. (Tr. 995:23-996:22.) Since Dr. Rosenthal's testimony was essential to establishing Plaintiff's claim for both economic and noneconomic damages, any change in the perceived credibility of Dr. Rosenthal is likely to have substantially affected the jury award. The error is therefore prejudicial.

B. Even viewing the evidence in the light most favorable to the trial court's discretion, allowing Defendant to elicit testimony that the report was drafted by Plaintiff's attorney was an abuse of discretion.

Because the trial court's decision as to the probative value and risk of prejudice of evidence is reviewed for abuse of discretion, Plaintiff is obligated to marshal the evidence in support of the judge's discretion under Utah R. App. P. 24(a)(9). The following is the record evidence that could be construed in favor of the trial court's decision:

- At the time of the drafting of the expert report, Dr. Rosenthal had not reviewed all of the medical records, as it stated in the report. He had only reviewed a summary of the medical records provided by Plaintiff's counsel. (Tr. 316:11-322:11.) The date of loss on the expert report was incorrect. (Tr. 321:7-9.)

While this fact is cited by the trial court in its denial of Plaintiff's motion for a new trial, it does not explain why revealing the authorship of the report would have any bearing to the accuracy of the statements in the report. Defendant could have questioned Dr. Rosenthal about his review of the medical records without going into the authorship

of the report.¹⁵ There was no evidence that the erroneous date of loss was anything but a typographical error. Further, the authorship of the report did not put this issue into context or give the error any sort of meaning. Because of the high risk of prejudice outweighed any probative value, the trial court abused its discretion in allowing testimony regarding the authorship of the report.

C. The trial court's jury instruction was not adequate to cure the prejudice.

It is reasonably likely that a jury, even after being instructed by the Court that the report “may be prepared and signed by either the witness who is testifying or by the party,” would have concluded that Dr. Rosenthal’s expert report was not credible because it was prepared by the attorney, would have given less weight to his opinions and awarded less in economic damages as a result. When looking at the effectiveness of jury instructions, the Court should determine what a lay jury is likely to do with the instruction. *See Randle v. Allen*, 862 P.2d 1329, 1335 (Utah 1993).

First, the jury instruction said that a “party” could draft an expert report. A lay jury is not likely to equate a party with a party’s attorney in interpreting this instruction. *See id.* (holding that a jury instruction’s use of terms in unfamiliar ways is likely to confuse a jury). Second, the jury instruction was given without context well before the testimony was elicited. The trial court did not warn them that they would hear testimony that the expert did not draft the report when giving them the instruction. Without such a context, the jury is more likely to have been confused by the instruction than enlightened by it. Third, the instruction was in technically constructed language that would be difficult for a

15. As a side note, Dr. Rosenthal did review all of the medical records after signing the report and before his deposition. His testimony was that the summary was accurate and that his opinions were unchanged. (Tr. 332:1-333:20.)

lay jury to understand. The language quotes the language of Rule 26(a)(3) directly, without regard to the complex sentence structure of the rule. As the Second Circuit has stated, “courts have repeatedly warned against the use of quotations from opinions of appellate courts, taken out of context and never intended as instructions to juries.” *Bernardo v. Bethlehem Steel Co.*, 314 F.2d 604, 609 (2d Cir. 1963); *see also Gehring v. Case Corp.*, 43 F.3d 340, 345 (7th Cir. 1994) (“The closer the instructions come to the jurors’ everyday language, the more likely the jurors are to apply them correctly.”). The same admonition should apply to the complex and exact language of the civil procedure rules.

Finally, simply telling the jury that a party can draft a report for an expert does not remove the implication that the attorney is putting words into the expert’s mouth. To know that, the jury would need to be familiar with the practices of legal drafting of evidence. It would be similar to allowing a jury to hear that an attorney had drafted an affidavit that a party or witness signed—the jury simply does not have the necessary background to understand that this is a practice that does not impugn the credibility of the statements contained in the document. Therefore, it is unlikely that the instruction cured the error.

IX. THE TRIAL COURT IMPROPERLY EXCLUDED THE TESTIMONY OF TOM HARRIS RELATING TO HIS INTIMATE RELATIONSHIP WITH HIS WIFE, THE PLAINTIFF, AS IT WAS OFFERED FOR THE PURPOSE OF ILLUSTRATING PLAINTIFF’S DIMINISHED CAPACITY FOR THE ENJOYMENT OF LIFE.

Tom Harris’s testimony regarding his intimate relationship with his wife is relevant inasmuch as it provides evidence for noneconomic damages. The Utah Supreme Court has stated:

The terms “noneconomic loss” and “general damages” merely euphemize what the damages truly represent—diminished capacity for the enjoyment of life. The measure is actually the difference between what life would have been like without the harm done by the [defendant], and what it is like with that additional burden.

Judd v. Drezga, 2004 UT 91, ¶ 4, 103 P.3d 135. This is different from a loss of consortium claim, which “is a separate and distinct action that belongs to the nonphysically injured spouse.” *Hackford v. Utah Power & Light*, 740 P.2d 1281, 1290-91 (Utah 1987) (Durham, J., dissenting). The relevant factors for a jury to consider when determining noneconomic damages are wide ranging, and properly includes any difference in Plaintiff’s capacity for her enjoyment of life. This certainly includes the difference in Plaintiff’s sexual relationship with her husband, about which Tom Harris was competent to testify. The trial court’s exclusion of this evidence was therefore in error.

This error hindered the ability of the Plaintiff to introduce evidence of the full extent of her loss of quality of life, and was therefore prejudicial.¹⁶ The trial court’s exclusion of the testimony also precluded Plaintiff from using Tom Harris’s testimony to support the credibility and impact of Wendy Harris’s testimony regarding her loss of quality of life. It is reasonably likely that the jury, after hearing Mr. Harris’s testimony, would have granted more in noneconomic damages than they otherwise did. The fact that the general damages award was so incredibly low supports that conclusion.

The trial court argues in its memorandum decision that to the extent that Mr. Harris’s testimony was intended to support the credibility of Wendy’s testimony

16. While Wendy’s testimony briefly touched on the subject of her intimate relationship with her husband, (Tr. 709:4-10; 712:19-21) the testimony was far too brief and general to rule her husband’s testimony as merely duplicative.

regarding her quality of life, it was improper bolstering, as Defendant did not attack her credibility on the issue of her intimate relationship, and otherwise it was not relevant. In a recent opinion, this Court explained that testifying as to a person's recollection of events is not improper bolstering, even if that testimony corroborates another person's testimony. *See State v. Pedersen*, 2010 UT App 38, ¶ 21, 227 P.3d 1264. In addition, the fact that one person's testimony of his recollection of events bolsters another person's testimony of his recollection of events does not make it irrelevant or prejudicial under Utah R. Evid. 403. *See Pedersen*, 2010 UT App 38 ¶¶ 33-35. Mr. Harris's testimony was a substantive recollection of Ms. Harris's quality of life, and so relevant for purposes of noneconomic damages.

X. THE TRIAL COURT IMPROPERLY ALLOWED DR. COLLEDGE'S WRITTEN CURRICULUM VITAE TO BE ADMITTED AS DOCUMENTARY EVIDENCE, AS THE DOCUMENT WAS INADMISSIBLE HEARSAY.

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Utah R. Evid. 801(c). Hearsay is inadmissible unless it falls into a recognized hearsay exception. Utah R. Evid. 802. Dr. Colledge's Curriculum Vitae is a written statement made out of court that was offered to prove what was asserted on the document—namely, Dr. Colledge's credentials. While Dr. Colledge testified as to his credentials separately from the document, this does not excuse the admission of the hearsay evidence. The Utah Court of Appeals has held that using hearsay evidence to "bolster" the statements of a witness is improper. *See State v. Bujan*, 2006 UT App 322, ¶¶ 27-28, 142 P.3d 581.

It is reasonably likely that the having Dr. Colledge's written Curriculum Vitae available for review in the jury room caused the jury to give more weight to Dr.

Colledge's testimony than they otherwise would have. Defendant's closing emphasizes this fact:

But more importantly you heard the testimony yesterday from Dr. Colledge. Dr. Colledge stated that Mrs. Harris's condition is caused by the fact she's got degenerative disc disease. **Dr. Colledge has written on this. He's published on this. You'll have his curriculum vitae, his resume, back in the jury room. He's an authority on this.** He's the medical director for the Labor Commission of the state of Utah. He deals with 70,000 injured workers a year. A lot of them have back injuries.

(Tr. 992:22-993:1) (emphasis added). Based on this evidence, it is reasonable to infer that the jury award would have been substantially different had it been excluded. The error is therefore harmful and a new trial is warranted.

XI. THE CUMULATIVE WEIGHT OF THE TRIAL COURT'S ERROR JUSTIFIES A NEW TRIAL IN THIS MATTER.

A party is entitled to a new trial even if no single error on its own is significant enough to warrant a new trial if the totality of the errors "undermines [the Court's] confidence . . . that a fair trial was had." *Whitehead v. American Motors Sales Corp*, 801 P.2d 920, 928 (Utah 1990); *see also State v. Young*, 853 P.2d 327, 367 (Utah 1993). To determine whether to grant a new trial on grounds of cumulative error, the Court should consider all identified errors, as well as any other errors that may have occurred. *State v. Kohl*, 2000 UT 35, ¶ 25, 999 P.2d 7. In determining whether other errors may have occurred, the Court should examine circumstances surrounding the trial that would suggest that a party was denied the ability to fully and freely litigate its case. *See Whitehead*, 801 P.2d at 928 (limitation of cross-examination); *State v. St. Clair*, 282 P.2d 323, 332 (Utah 1955) (limiting the time of closing arguments).

In this case, many of the errors listed above could have been avoided had they been fully briefed and argued in the first instance. The lack of written motions in limine created a situation that demanded split-second judgments without the ability to read and consider the relevant authorities. That is the sort of atmosphere in which errors abound. Even if the Court believes that any of the previously described errors, standing alone, do not warrant a new trial, it is undoubtedly the case that the errors listed above, as well as other errors that were likely caused by the lack of written motions in limine, when viewed as a whole, suggest that Plaintiff was not allowed to fully present her case to the jury and that the verdict was not consistent with justice in this case.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully asks this Court to reverse the trial court's decision and remand for a new trial in this matter.

RESPECTFULLY SUBMITTED this 11th day of August, 2010.

/S/ Nathan Whittaker
Nathan Whittaker, for himself and
Michael E. Day
DAY SHELL & LILJENQUIST, L.C.
Attorneys for Plaintiff/Appellant

PROOF OF SERVICE

I hereby certify that I caused two copies of the foregoing brief to be placed in the United States Mail, first class, postage prepaid, to the following:

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DATED this 11th day of August, 2010.

/S/ Nathan Whittaker

ADDENDUM

**IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH**

WENDY HARRIS,

Plaintiff,

vs.

SHOPKO STORES, INC.,

Defendant.

MEMORANDUM DECISION

Civil No. 070101906

Date: December 23, 2009

JUDGE CHRISTINE S. JOHNSON

This matter came before the Court on Plaintiff's Motion for a New Trial, or in the Alternative, Additur, received by this Court together with a Memorandum in Support on August 31, 2009. Shopko filed its Opposition to Plaintiff's Motion on September 15, 2009. Harris filed her Reply Memorandum on October 12, 2009. The court heard oral arguments on the pending motion on November 16, 2009. Plaintiff was present with counsel, Mr. Nathan Whitaker and Mr. Michael Day. Shopko was present through counsel Alain Balmanno. Having considered arguments presented, having reviewed the file and pleadings submitted by counsel, and having reviewed the applicable law, the Court now makes the following findings and conclusions:

BACKGROUND

1. It is not necessary to provide here a lengthy recitation of the facts, as they are fully preserved in the record. The following are summarized facts pertinent to the motion before the court, granting the jury deference in its role as the fact-finder, and recognizing that for the purposes of a motion for a new trial, the court should view the evidence in the light most favorable to the verdict. *Tingey v. Christensen*, 987 P.2d 425, at ¶7 (Utah 1999).
2. This action centers around an incident which occurred at Defendant Shopko's retail establishment located in Orem, Utah. The incident occurred on March 29, 2006, when Harris was shopping for an office chair. Harris attempted to sit down in a model chair, which was held out as an example of chairs which were offered for purchase. In the process of sitting on the chair, the seat pad detached from the base and Harris fell to the floor. Harris experienced immediate physical pain from her fall and sought medical treatment for her injuries after returning home. She later filed this action, attributing negligence to Shopko for their failure to properly assemble the chair and requesting economic damages for both her existing and future medical expenses, as well as non-economic damages.
3. Trial was conducted from July 13-16, 2009. At the trial, Harris brought forward the testimony of various medical providers to describe her physical injuries from the Shopko incident and the treatment she has received. The primary injury was described as continuing pain in her lower back and coccyx. Harris's treatments since the accident

have included massage therapy, chiropractic adjustments, pain medications, and ultimately a spinal nerve-burning procedure. Future similar procedures are anticipated. Harris presented testimony that her injury was caused by the Shopko incident, and that these procedures have been both reasonable and necessary.

4. Testimony elicited by Shopko countered that Harris suffered from pre-existing conditions, including fibromyalgia and other various complaints of back and neck pain over a period of years. Harris's chiropractor conceded that Harris's pre-existing conditions could be a source of her pain. Testimony further described that Harris's current complaints could be age-related and attributable to the unrelated condition of degenerative disc disorder. Neither party attempted to provide a specific estimate with regard to how much of Harris's pain was attributable to the incident at Shopko, and how much was attributable to these other conditions.
5. Additionally, trial testimony included medical evidence critical of the treatment Harris had received. A former treating physician of Harris, Dr. College, elaborated that much of the treatment sought by Harris was not useful. Specifically, massage therapy and chiropractic care were not helpful in treating her condition and, based on medical evidence, they had not helped improve Harris's functioning. One invoice for message therapy indicated that Harris had received a couple's massage, which was clearly not therapeutic in nature. Dr. College also expressed skepticism in the nerve-burning procedure, as it did nothing to address the underlying tissue injury. He further testified that Harris abused the painkillers prescribed to her, and that this abuse actually tends to

- intensify pain for chronic pain sufferers like Harris. Harris's current physician, Dr. Rosenthal, also confirmed that Harris had been abusing her narcotic medication.
6. With regard to future medical expenses sought by Harris, medical testimony was less than clear about what would be required. Dr. Rosenthal testified that knowing Harris's future needs was akin to looking into a crystal ball, and that he could not testify with a reasonable degree of medical certainty that Harris would need the future pain medication which was requested as part of the award for future damages.
 7. The jury found Shopko negligent but awarded a lesser amount of damages than Harris requested. Harris followed by filing the present motion, requesting a new trial, or alternatively an additur, due to multiple argued errors at trial.

CONCLUSIONS OF LAW

8. Harris makes her motion pursuant to Rule 59(a) of the Utah Rules of Civil Procedure, which states in relevant part that a new trial or additur of damages may be granted when, inter alia, there is "irregularity in the proceedings of the court" or there are "excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice," or there is an "insufficiency of the evidence to justify the verdict or other decision." Utah R. Civ. P. 59(a)(1), (5)-(6).
9. The jury is entitled to a large degree of deference in its role in making a damage award. A motion for a new trial should be granted "only where it is obvious that the jury lacked a reasonable basis for its decision, acted with prejudice or passion, or disregarded

competent evidence.” *Andreason v. Aetna Casualty & Surety Co.*, 848 P.2d 171, 174 (UT App 1993).

Plaintiff's Deposition Transcript

10. Harris first asserts that the Court erroneously excluded portions of her transcript, preventing her from clarifying other portions which had been introduced by Shopko on cross-examination. This error, Harris claims, was prejudicial as it prevented her from rehabilitating her credibility.
11. Shopko responds that Defense counsel did not object to Plaintiff's use of the deposition transcript itself. Rather, Defense counsel merely objected that Plaintiff's counsel had not asked the witness a question regarding the transcript.
12. Indeed, the Court did not rule at trial that Harris's deposition transcript was excluded. This Court's ruling was limited merely to directing Plaintiff's counsel to elicit the proposed testimony regarding the deposition in the form of a question. Counsel then initiated a question, but then withdrew it and closed his re-direct of his witness.
13. The Court agrees that it was likely prejudicial to Ms. Harris that she was not able to further explain her deposition testimony. However, any prejudice from this is not attributable to the Court. The Court directed Plaintiff's counsel that he could ask Ms. Harris a question about the transcript. Counsel failed to do so.

Specifications of the Chair

14. Harris claims that a new trial or additur is warranted based upon the court's ruling at trial excluding the specifications of the suspect chair from evidence.

15. Through Plaintiff's Requests for Admission no. 6, served on Defendant on April 6, 2009, Shopko had admitted that Office Star Model #2993 was the type of chair at issue in the case, and that the photographs and instructions attached were accurate. In preparation for trial, counsel on both sides stipulated to the admission of numerous documents; however, the specifications for the chair were not included among those stipulated documents. At trial, Harris showed the specifications of the chair to an entry-level employee of Shopko, Sean Briggs, in what appeared to be an attempt to lay foundation for the document. Shopko objected to the foundation under Rule 901 and the court sustained the objection.
16. URE 901 describes what is required for foundation of documentary evidence as follows: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The rule elaborates that foundation may be provided by "[t]estimony of witness with knowledge." Utah R. Evid. 901(b)(1).
17. Sean Briggs appeared to have no knowledge of the document being shown to him, and was not a witness with knowledge under Rule 901.
18. Harris asserts that Shopko had waived its foundational objection to the document by not objecting to it within 14 days pursuant to Rule 26. However, Rule 26 allows the court to excuse any waiver "for good cause shown." Utah R. Civ. Pro. 26(a)(4)(d). The court found good cause, as the witness on the stand did not appear to have any knowledge surrounding the document, and because the court deemed that the document, if it had

been admitted to through discovery, ought to have been included with the other stipulated documents which were already before the court.

19. In any case, even should the exclusion of this document be deemed error, there is no support for the position that Plaintiff was prejudiced by it. An exemplar chair was used as a demonstrative exhibit throughout the trial to show the jury the type of chair that was at issue in the incident. Plaintiff's primary argument in support of possible prejudice is that the written specifications described that the chair's maximum height was 21.5 inches, while counsel for Shopko represented that its maximum height was 19 inches.
20. This Court is not persuaded that this distinction is significant. In the first place, there was no indication that the chair was in fact extended to its maximum height at the time of the incident. Therefore, the idea that the jury automatically concluded that Ms. Harris fell from a 19 inch position is without merit. We simply do not know the height of the chair at the time of her fall. Furthermore, Ms. Harris herself testified that the seat pad detached from the chair immediately, and did little, if anything, to break her fall. Accordingly, whether the chair was adjusted to 19 inches, 21.5 inches, or something else, has little significance.
21. Finally, Harris asserts that counsel for Shopko offered improper testimony by representing to the jury that the maximum height of the chair was 19 inches, and that the specifications for the chair should have been allowed to impeach counsel's improper testimony. This argument was not made at trial, thus this Court was not able to consider allowing the specifications to come in for impeachment purposes. In asserting this point

now Harris concedes that Plaintiff's counsel refrained from objecting to the improper testimony by counsel during trial "as part of a litigation strategy." *Plaintiff's Memorandum* at 21. Where Plaintiff's counsel exercised professional discretion in not making an objection at trial, this Court will not now consider that as reversible error.

22. Accordingly, the exclusion of the chair's specifications is not a basis for a new trial or additur.

Present Cash Value

23. Harris next objects to the instruction provided to the jury with regard to present cash value. The instruction, which was taken from the Model Jury Instructions, provided to the jury was as follows:

If you decide that Wendy Harris is entitled to damages for future economic losses, then the amount of those damages must be reduced to present cash value. This is because any damages awarded would be paid now, even though Wendy Harris would not suffer the economic losses until some time in the future. Money received today would be invested and earn a return or yield. To reduce an award for future damages to present cash value, you must determine the amount of money needed today that, when reasonably and safely invested, will provide Wendy Harris with the amount of money needed to compensate her for future economic losses, if any. In making your determination, you should consider the earnings from a reasonably safe investment.

24. Harris asserts that some manner of testimony was required for the jury to interpret how to calculate the damages into a present value. Harris cites as authority *Gallegos ex rel. Rynes v. Dick Simon Trucking, Inc.*, 2004 UT App 322, 110 P.3d 710, *cert. denied* (Utah 2005). However the *Gallegos* decision does not stand for this proposition. *Gallegos* permits expert testimony on annuities in order to translate the present value of those future payments. However, as is observed by the Committee Notes, "Utah law is silent

on whether expert testimony, government tables, or other evidence is necessary before a jury is charged to calculate present cash value.” MUJI CV2021 Committee Notes.

25. Based on current law, no expert testimony or other supplementary evidence was required in this case for the jury to make the determination on present value. The plaintiff’s evidence with regard to future damages was not presented in the form of a future sum, such as an annuity, which needed to be translated into a present value. Rather, plaintiff presented the present cost of medical procedures which would be required in the future. It was fairly within the province of the jury to make a reasonable judgment about the present sum of money Ms. Harris would require for her future treatments.
26. Furthermore, the jury instruction given prevented confusion. Had no instruction been given, the jury would have been forced to guess at whether they were to award damages based on present value or on some unknown future figure. Instructing the jury with an accurate statement of the law provided them with the information they required to make a fair and reasonable award of damages.

Apportionment of Pre-Existing Injury

27. Harris asserts that the court erred in advising the jury on the issue of apportionment, and that this error warrants the granting of a new trial.
28. Shopko presented substantial evidence that Harris’s injuries could be attributed to alternative sources, both through cross examination of Plaintiff’s witnesses, and through affirmative testimony from its own witnesses. Harris had a history of neck and back pain, her medical records included references to fibromyalgia, and testimony also included the

opinion that her current condition was not trauma-related, but caused by degenerative disk disease. In short, testimony was conflicted with regard to the cause of Harris's condition.

29. The Utah Supreme Court considered the issue of apportionment in *Robinson v. All-Star Delivery*, 992 P.2d 969 (Utah 1999). In *Robinson*, the plaintiff sued the defendant after a motor vehicle collision where plaintiff alleged the he was physically injured. The defendant did not dispute his liability in causing the accident, but asserted that plaintiff's injuries were attributable to a previous motor vehicle accident. *Id.* At trial, the parties presented conflicting expert testimony as to whether the plaintiff's injuries arose from the previous accident, or the accident at issue. The plaintiff's doctor testified that the physical injuries were primarily the result of the accident defendant caused, while defendant's doctor "concluded that it was more likely than not that [the plaintiff's injuries] each stemmed from the [previous] accident. However, [he] acknowledged that the [later] accident could have caused a 'flare up' or 'some increase' in pain to Robinson's preexisting injuries." *Id.* at ¶6.
30. The trial court did not give plaintiff's proposed jury instruction on aggravation of preexisting injuries, and when the jury verdict returned for a lesser amount than was requested, the plaintiff appealed. The Utah Supreme Court found the trial court's decision to be reversible error, and the case was remanded for a new trial on damages. In so holding, the Court observed that "the evidence was in conflict as to the apportionability of the damages. [The plaintiff's doctor] testified that the [recent] accident

caused most of Robinson's damages. [The defendant's doctor] testified that the [earlier] accident caused Robinson's injuries. Thus, the trial court should have instructed the jury on what to do if it was unable to apportion damages in a reasonable manner." *Id.* at 14.

31. The facts of the present case are notably similar to those of *Robinson*. In both instances, the plaintiff's medical testimony indicated that the injuries were linked to the accident which initiated the lawsuit, while the defendant's medical testimony indicated that the injuries were largely attributable to other causes. In neither *Robinson* nor this case was there an attempt to offer testimony as to what specific percentage, if any, of the damages could be tied to the accident at issue.¹ Thus, the jury needed to be instructed about what to do if they could not apportion the damages in a reasonable manner.

32. The instructions given in the present case accomplished that purpose. Taken entirely from *Model Utah Jury Instruction*, Civil 2018 and 2019, the instructions advised jurors that it is their duty to try to apportion damages, and if they were not able to reasonably do so, then they must conclude that the entire harm was caused by Shopko. This is a correct statement of the law, and it provided the jury with the information they required in order to weigh the conflicting testimony presented with regard to Harris's medical injuries.

Whereas the *Robinson* court determined, under strikingly similar circumstances, that it

¹It does not appear that this type of specificity is required, as the Committee Note makes clear that the jury need not make this precise finding in its verdict. The Committee observes that "[t]his instruction is not intended to suggest that the verdict form include a line-item allocation of what part of the harm can be apportioned to the pre-existing condition, and what part to the defendant's fault. That question is answered by the jury's award of damages[.]" MUJI CV2018 Committee Notes.

was reversible error *not* to give the pre-existing condition instruction, this court cannot reasonably find that it was reversible error to give it.

Liability of a Business Owners Jury Instruction

33. Harris next contends that the Jury Instruction regarding the liability of business owners was error and should result in a new trial or additur. Harris does not assert that the instruction was an incorrect statement of the law; rather, she claims that the instruction was prejudicial and resulted in a lowered damage award. Shopko responds that this instruction was directed to address the jury's deliberations regarding liability, and whereas the jury found Shopko negligent, the instruction has no bearing on Harris's current complaint regarding the damage award.
34. Shopko is correct that the jury instruction at issue is unrelated to damages. It solely addressed the question of negligence, and when read in its entirety, described for the jury the distinction between a temporary condition, which would require notice to the business owner, and a permanent condition, which would not. Harris does not specifically articulate how this instruction was prejudicial to its damage award, but broadly claims that the instruction suggests "that there is a requirement for a plaintiff to prove beyond negligence." *Plaintiff's Memorandum* at p. 26.
35. This Court does not read any such requirement into this instruction. Whereas the jury found Shopko liable, this instruction has no relation to the damage award to which Harris now objects. Accordingly, it does not form a basis for a new trial or additur.

Dr. College's Delayed Recovery Syndrome Testimony

36. Plaintiff asserts that the Court erred when it allowed Dr. College to testify regarding “delayed recovery syndrome” as this testimony was not relevant, and it was more prejudicial than probative. Harris maintains that this testimony acted to lower her award of damages. Shopko responds that this testimony was relevant because it speaks to the issue of whether the treatment Harris sought was necessary or reasonable.
37. Dr. College offered his testimony regarding “delayed recovery syndrome” because it explained, in part, why he believed that the treatment she sought was not medically reasonable or necessary. Dr. College agreed that the Shopko incident had caused some soft tissue injury to the Plaintiff, but elaborated that this type of injury should be expected to heal after a matter of weeks, not years as was the case with Ms. Harris. In Ms. Harris’s case, her condition evolved into what Dr. College described as “chronic pain.” Dr. College explained that the remedies Harris had sought, such as chiropractic care, massage therapy, and surgery, were not reasonable or necessary for the treatment of her chronic pain. As stated by Dr. College: “after three to eight weeks the pain is chronic, establishes new circuitry, and serves no useful purpose. *Hurt does not mean harm in this case*, and to treat chronic pain like acute pain limits quality of life and is debilitating to the patients.” *Defendant's Opposition*, at p. 32 (emphasis added).
38. URE 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

39. Given this broad definition of relevancy, it is simply not tenable to suggest that Dr. College's testimony on this point was not relevant. Central to the issue of damages in this case was the question of whether Ms. Harris's treatment was reasonable and necessary. Dr. College, one of Harris's treating physicians, used his assessment that she suffered from delayed recovery syndrome to explain why he believed much of the treatment she sought was neither reasonable nor necessary. It was Dr. College's opinion that Ms. Harris's course of treatment was not necessary to treat the injury she sustained in the Shopko incident. This type of testimony is relevant under the rule.
40. Relevant evidence may be excluded if unduly prejudicial, as described in URE 403: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]"
41. Harris maintains that Dr. College's testimony is confusing and prejudicial. She asserts that a tortfeasor takes the plaintiff as he finds her. This includes any physical or mental weakness that would make the plaintiff more susceptible to injury, or cause the plaintiff to heal more slowly. Accordingly, if Harris does suffer from delayed recovery syndrome, she is still entitled to recover for her injuries.
42. However, the jury was instructed with regard to this principle. Jury Instruction No. 22 reads as follows: "A person who may be more susceptible to injury than someone else is still entitled to recover the full amount of damages that were caused by Defendant's fault."

In other words, the amount of damages should not be reduced merely because Plaintiff may be more susceptible to injury than someone else.”

43. Accordingly, the jury was aware that any reduction in damages could not be given merely because Ms. Harris was susceptible to greater injury, or to a prolonged recovery as a result of her delayed recovery syndrome.
44. In addition, much of Shopko’s case was prejudicial to Harris, and similarly much of Harris’s case was prejudicial to Shopko. Prejudice alone is not a sufficient basis to exclude relevant evidence. “[T]he critical question is whether certain testimony is so prejudicial that the jury will be unable to fairly weigh the evidence.” *State v. Downs*, 2008 UT App 247 ¶7; 190 P.3d 17.
45. This Court is not persuaded that Dr. College’s testimony regarding delayed recovery syndrome prevented the jury from fairly weighing all of the evidence presented. His testimony was one factor among many which the jury considered in arriving at the damage award in this case. Indeed, it is clear from the verdict that the jury did not adopt Dr. College’s pessimistic view of Harris’s treatment. Dr. College discounted the nerve-burning procedure Harris had received and testified that the future similar procedures she is seeking would not be helpful in treating her pain. Notwithstanding this, the jury awarded Harris \$10,000 in future damages, adopting, at least in part, her theory that future medical treatment was reasonable and necessary and rejecting Dr. College’s opinion that such a procedure was not reasonable in the treatment of her chronic pain.
46. Accordingly, Dr. College’s testimony does not provide a basis for new trial or an additur.

Dr. College's Curriculum Vitae

47. Plaintiff further objects to the admission of Dr. College's Curriculum Vitae as documentary evidence, asserting that it is hearsay.
48. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Utah R. Evid. 801(c). Unless an exception to this rule applies, hearsay is not admissible. *See* Utah R. Evid. 802. Harris asserts that receiving the CV was reversible error, as it allowed the jury to place undue emphasis on Dr. College's qualifications.
49. Shopko concedes that the CV was hearsay, but claims that it qualifies for an exception to exclusion pursuant to Rule 807. However, at a minimum, this rule requires that the adverse party receive notice "in advance of the trial or hearing to provide the adverse party with a fair opportunity to meet it." Utah R. Evid. 807. This notice was not given.
50. Accordingly, the CV does not meet the hearsay exception outlined in Rule 807. Notwithstanding, this court is persuaded that "if a witness testifies to the points on his CV, exclusion serves little purpose" *Defendant's Opposition* at p. 35. Indeed, at trial, Dr. College's qualifications were fully presented to the jury and it seems far-fetched to believe that seeing in print the same information that was presented verbally amounts to the reversible error Harris now claims.
51. The court must consider any motion for a new trial in light of the following:
- No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court

inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Utah R. Civ. Pro. 61.

53. There is nothing presented by Harris to give rise to the conclusion that the jury's review of Dr. College's CV affected the substantial rights of the Plaintiff. Accordingly, it cannot be viewed as the basis for a new trial or additur.

Dr. Rosenthal's Report

54. Plaintiff next objects to the characterization at trial of her expert's report as "attorney drafted." At trial, Shopko cross-examined Dr. Rosenthal regarding the credibility of the conclusions contained in his written report. This cross-examination included an inquiry into the fact that Dr. Rosenthal's report was drafted by Plaintiff's counsel, and then signed by Dr. Rosenthal after his review. Plaintiff objected, asserting that these questions were irrelevant and prejudicial, and Plaintiff renews this argument here.
55. Procedural rules regarding expert reports permit the practice adopted by Plaintiff. Parties are required to disclose expert witnesses prior to trial, and this disclosure must "be accompanied by a written report prepared and signed by the witness *or party*." Utah R. Civ. P. 26(a)(3)(B)(emphasis added). Thus, Harris did nothing improper in proceeding in this fashion, and likely minimized some of the expenses of retaining an expert witness. Indeed, this cost-savings is contemplated by the rule.²

²The Advisory Committee reports that one consideration for this rule was "[b]oth plaintiffs' attorneys and defense attorneys reported on the high cost of reports by experts[.]" Utah R. Civ. P. 26, Advisory Committee's Note.

56. However, the issue of cost-savings aside, the simple fact remains that the practice of having someone other than the witness draft the report may, under certain facts, introduce a credibility issue. This was the case here. Dr. Rosenthal's report contained in it's opening statement the assertion that the report was "based upon the review of the Plaintiff's medical records." However, Dr. Rosenthal conceded that his record review was incomplete, and that he had not reviewed Alta View Hospital's records, Spanish Fork Clinic's records, South Towne Chiropractic records, Central Utah Clinic's records, Dr. College's records, Utah Neurological Clinic's records, Dr. Cardner's report, Intermountain Healthcare records, Massage Envy records, Dr. Jackson's records, South Valley Physical Therapy records, the August 2007 MRI, or the pre-Shopko incident records. What he had reviewed was a *summary* of these records, which had been prepared by Plaintiff's counsel.
57. In short, Dr. Rosenthal's written assertion that, in consideration of his conclusions, he had reviewed the Plaintiff's medical records was, at best, an overstatement, which seems attributable to the fact that he did not author the report that he signed. Inquiry into the credibility of Dr. Rosenthal's report, and its conclusions, is allowed, and under these facts was clearly appropriate.
58. Immediately prior to cross-examination on this issue, the court instructed the jury that "pursuant to Rule 26, a witness who is retained or specially employed to provide expert testimony in a case is required to submit a written report. That report may be prepared by either the witness who is testifying or a party." This supplementary instruction was taken

almost directly from the rule, and was intended to advise the jury that Harris had done nothing *improper* in allowing Dr. Rosenthal to sign a report prepared by counsel, and that no inference of impropriety should be given. Rather, any inquiry into the authorship of the report simply went to the weight of its conclusions. This is an issue which is clearly relevant for the jury to consider. Both parties at trial are entitled to fairness in the proceedings, and this includes the right of the Defendant to cross-examine an expert witness about the credibility of his conclusions.

59. Accordingly, the court rejects the argument that the reference to Dr. Rosenthal's report as being "attorney-drafted" was irrelevant or unduly prejudicial.

Plaintiff's Loss of Consortium

60. Harris's next claim of error is the exclusion of a portion of the testimony from Harris's husband, Tom Harris. At trial, Mr. Harris described for the jury the diminished quality of life Ms. Harris has experienced since the Shopko incident. Shopko objected at the point where Plaintiff's counsel inquired as to the couple's intimate relationship, based upon the fact that no loss of consortium claim had been made. The Court sustained Shopko's objection and excluded the testimony. Plaintiff now claims that non-economic damages were reduced as the jury was not permitted to hear this portion of Mr. Harris's testimony.
61. However, at trial Ms. Harris offered her own testimony regarding her lessened quality of life since the incident, and was permitted to describe for the jury at length what she believes she has suffered in terms of non-economic damages. Mr. Harris was permitted to bolster her testimony, with the exception of his account of their intimate relationship.

62. Plaintiff does not dispute that there was no loss of consortium claim made on the part of Mr. Harris, and that the testimony proffered by Mr. Harris was intended only “to support the credibility of Ms. Harris’s testimony[.]” *Plaintiff’s Memorandum* at 34.
63. Utah law provides that a spouse may maintain an action against a third party for loss of consortium, provided that such claim is made concurrently with the claim of the injured party. Utah Code Ann. §30-2-11(2)-(4). However, where this action included no complaint of loss of consortium, Mr. Harris’s testimony about his lack of intimacy with his wife was simply not relevant. Mr. Harris’s account of any lack of intimacy would have offered nothing to the jury’s consideration of how Ms. Harris had been damaged. Ms. Harris was free to detail for the jury the manner in which the quality of her life had been diminished since her injury, and this testimony certainly could have included a description of her loss of intimacy. Had Shopko attacked her credibility on this point, Mr. Harris’s testimony supporting her credibility would have been appropriate. However, Shopko maintains that it did not attack Ms. Harris’s credibility regarding any loss of intimacy, and Harris, in not contesting this point, appears to concede the same.
64. Accordingly, this Court is not persuaded that Mr. Harris’s proffered testimony about his intimate relationship with his wife was relevant. Exclusion of this testimony is not a basis for a new trial or additur.

Sufficiency of the Evidence

65. Harris next contends that a new trial or additur is warranted due to an insufficiency of the evidence, based upon the assertion that the damages awarded are inadequate given the evidence presented by the Plaintiff.
66. Harris contends in support of this argument is that the damage award was given in a round number, and this should compel a finding that the jury simply reached an arbitrary figure without attempting to determine whether the damages were reasonable or necessary. No authority, however, is offered for this position. This Court declines to simply make this assumption. It is the prerogative of the jury to make the determination of damages, and deference must accordingly be given to the jury's verdict. "We cannot substitute our judgment for that of the fact finder unless the evidence compels a finding that reasonable men and women would, of necessity, come to a different conclusion." *Onyeabor v. Pro Roofing*, 787 P.2d 525, 530 (Utah Ct. App. 1990).
67. The evidence presented at trial does not compel a different conclusion. Indeed, Harris's claim that the jury's damage award is not supported by the evidence ignores much of the testimony that was presented during this trial. While the Plaintiff did present significant evidence in its case that Ms. Harris was injured in the Shopko incident, and that she incurred necessary and reasonable medical expenses as a result, Shopko also presented a compelling case. Shopko's theory of the case was first, it was not negligent and did not cause Harris's injury, and second, if there was causation, that the medical expenses were unrelated to the Shopko incident, and they were not reasonable or necessary.

68. At the close of Harris's case-in-chief, both sides made a motion for a directed verdict. This Court denied both motions, noting that a reasonable jury could find for either the Plaintiff or the Defendant. The verdict of the jury fully supports the Court's ruling on that motion. The jury in this matter concluded that Shopko was negligent, and caused Ms. Harris's injury, thus rejecting Shopko's contention that it was not liable. However the jury also appears to have concluded that many of Shopko's arguments with regard to damages were well-taken.
69. There were multiple grounds for the jury to reduce the amount of damages from what was requested by Harris. The jury heard significant evidence of the following: (1) Harris had pre-existing injuries and health complaints which could account for many of her on-going physical complaints, including evidence that Harris currently suffered from degenerative disc disease which was unrelated to the Shopko incident, and that she had previously complained of back pain and possible fibromyalgia; (2) Harris had abused pain medication after the Shopko incident, taking beyond the amount her physicians prescribed as necessary, thereafter placing herself in a position where she was physically dependant upon the drugs as well as actually intensifying her pain level; (3) much of her past treatment was characterized as not being reasonable or necessary, as chiropractic sessions and message therapy did not serve to treat her underlying injury³; (4) the future treatment

³The jury likely found in particular Ms. Harris's "couple's massage" to be a particularly egregious mis-use of treatment. While there was only one example of a couple's massage, this certainly could have undercut Harris's credibility and made it appear that she was seeking treatment that was not truly related to the Shopko incident.

requested was similarly criticized as being marginal, unnecessary, and completely speculative.

70. In short, there was significant evidence to support the jury's conclusions that while Shopko was liable for Ms. Harris's fall, Shopko was not responsible for the amount of damages requested. While Harris may have a different opinion about the result, this is not a basis to set aside the damage award of the jury.
71. Absent some evidence compelling this Court to set aside the conclusions of the jury, this Court declines to grant a new trial or additur on Harris's claim of insufficient evidence.

Passion or Prejudice

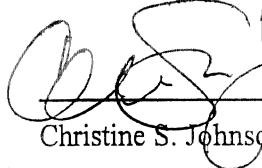
72. Plaintiff's final contention is that a new trial or additur is warranted as the jury's award appears to have been given under passion or prejudice. Rule 59 does permit a new trial or amendment to judgment for "[e]xcessive or inadequate damages, appearing to have been given under the influence of passion or prejudice." Utah R. Civ. Pro. 59(a)(5).
73. However, the Court of Appeals has previously determined that "[a] trial court *cannot grant* a new trial if there is sufficient evidence to support a verdict for either party and the judge merely disagrees with the judgment of the jury." *Neely v. Bennett*, 51 P.3d 724, 729 (UT App 2002) (emphasis in original).
74. As stated above, there is ample evidence to support the conclusions of the jury, and no evidence to suggest that the jury rendered its decision based upon passion or prejudice. Harris "simply failed to convince the jury of [her] entire case." *Onyeabor*, 787 P.2d at 530. This is not a basis for a new trial or additur.

ORDER

75. Based upon all the foregoing, Harris's Motion for a New Trial or Additur is DENIED.

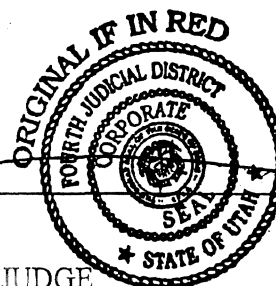
DATED this 23 day of December, 2009.

BY THE COURT:



Christine S. Johnson

DISTRICT COURT JUDGE



A certificate of mailing is on the following page.

1 that she reasonably incurred to minimize them.

2 "Number 26, Present Cash Value, if you
3 decide that Wendy Harris is entitled to damages for
4 future economic losses, then the amount of those
5 damages must be reduced to present cash value. This
6 is because any damages awarded would be paid now even
7 though Wendy Harris would not suffer the economic
8 losses until some time in the future. Money received
9 today would be invested and earn a return or yield.
10 To reduce an award for future damages to present cash
11 value, you must determine the amount of money needed
12 today that when reasonably and safely invested will
13 provide Wendy Harris with the amount of money needed
14 to compensate her for future economic losses if any.
15 In making your determination, you should consider the
16 earnings from a reasonably safe investment.

17 "27, Collateral Source Payments, if you
18 choose to award damages, you shall award the amount
19 that fully compensates plaintiff. Do not speculate
20 on or consider any other possible sources of benefit
21 plaintiff may have received. After you have returned
22 your verdict, I will make whatever adjustments may be
23 appropriate.

24 "28, what to take with you into the jury
25 room, you may take the following things with you when

1 may be more susceptible to injury than someone else
2 is still entitled to recover the full amount of
3 damages that were caused by defendant's faults. In
4 other words, the amount of damages should not be
5 reduced merely because plaintiff may be more
6 susceptible to injury than someone else.

7 "23, Aggravation of Symptomatic Preexisting
8 Conditions, if a plaintiff had a physical, emotional,
9 or mental condition before the time of March 29th,
10 2006 she is not entitled to recover damages for that
11 condition or that disability. However, plaintiff is
12 entitled to recover damages for any aggravation of
13 the preexisting condition that was caused by
14 defendant's fault even if plaintiff's preexisting
15 condition made her more vulnerable to physical or
16 emotional harm than the average person. This is true
17 even if another person may not have suffered any harm
18 from the event at all. When a preexisting condition
19 makes the damages from injury greater than they would
20 have been without the condition, it is your duty to
21 try and determine what portion of the physical,
22 emotional, or mental harm to plaintiff was caused by
23 preexisting condition and what portion was caused by
24 the March 29, 2006, fall.

25 If you are not able to make an

1 apportionment, then you must conclude that the entire
2 physical, emotional, and mental at harm to the
3 plaintiff Wendy Harris was caused by defendant
4 Shopko's fault.

5 "No. 24, Aggravation of Dormant Preexisting
6 Condition, a person who has a physical, emotional, or
7 mental condition before the time of March 29, 2006
8 incident is not entitled to recover damages for that
9 preexisting condition or disability. However, if a
10 person has a previous existing condition that does
11 not cause pain or disability but the March 29, 2006
12 incident causes the person to suffer physical,
13 emotional, or mental suffering, Wendy Harris may
14 recover all damages associated" -- I'm sorry --
15 "caused by the event."

16 "Number 25, Mitigation of Damages,
17 plaintiff has the duty to exercise reasonable
18 diligence and care to minimize the damages caused by
19 defendant's fault. Any damages awarded to plaintiff
20 should not include those that plaintiff could have
21 avoided by taking reasonable steps. It is
22 defendant's burden to prove that plaintiff could have
23 minimized her damages but failed to do so. If
24 plaintiff made reasonable efforts to minimize her
25 damages, then your award should include the amounts